Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LOUIS MALPESO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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85 pp

QUESTIONS PRESENTED

1. Whether the Trial Court violated defendant's right to present a defense when it erroneously barred proof (a) that a key figure in the trial testimony was actually a government informant, and (b) that the lead FBI agent assigned to this case was under criminal investigation for his corrupt relationship with the informant?

2. Whether defendant's sentence must be vacated because U.S.S.G. § 1B1.2(d) is unconstitutional – an issue that (a) has split the Courts of Appeals, and (b) this Court has already agreed to resolve in *Edwards v. United States*, 118 S.Ct. 334 (1997)?

LIST OF PARTIES

Petitioner was indicted with Anthony Liberatore, Christopher Liberatore, Joseph Amato and Robert Gallagher. After the Liberatores became cooperating witnesses, petitioner stood trial with Amato and Gallagher. In a different trial, Amato was also convicted under a separate indictment.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Louis Malpeso respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, affirming his conviction and 95 year sentence for four counts of violating or conspiring to violate 18 U.S.C. § 1959 ("Violent Crimes in Aid of Racketeering"); two counts of violating 18 U.S.C. § 924(c)(1) (using or carrying a firearm during a crime of violence); and one count of being a felon in possession of a firearm (18 U.S.C. §§ 922(g)(1), 924(a)(2)).

Opinion Below

The Court of Appeals' opinion, *United States v. Malpeso*, 115 F.3d 155 (2d Cir. 1997), appears at 1a.[1]

Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Second Circuit denied Malpeso's rehearing petition on October 3, 1997. (30a-31a) On December, 22, 1997, Justice Ginsburg granted Malpeso's motion for a 30 day extension, to January 31, 1998, of his time to petition for *certiorari*. (32a-37a) Due to, *inter alia*, a medical emergency in counsel's family, Malpeso moved, on January 20, 1998, for an additional 30 day extension pursuant to this Court's Rule 13.5. (38a-41a) Receiving no decision, counsel instructed his office manager, on February 10, to call this Court for further inquiry. In response, Deputy Clerk Loretta S. Ruffin told counsel's office manager that the motion for an additional 30 day extension had been denied on January 22, nine days before the petition's due date. Thus, had counsel received timely notice of the denial, the January 31 deadline still could have been met. However, as evidenced by this Court's "Notification List" – faxed by Ms. Ruffin, at counsel's request, on February 11 – notice of the denial was sent to counsel's old office address, and never forwarded to the current address. (44a) This petition therefore is, inevitably, some two to three weeks out of time.

Given this unique factual scenario, we respectfully ask this Court to waive the time requirement and decide the petition on the merits. *See* R. Stern, E. Grossman, S. Shapiro & K. Geller, *Supreme Court Practice*, 282 (7th ed. 1993) and cases cited there. We make this request because (a) the untimeliness stems from a technical glitch beyond Malpeso's control; (b)

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[1] Numbers followed by "a" refer to pages of the Appendix to this petition. Numbers preceded by "A:" refer to pages of the Joint Appendix in the Court of Appeals. Numbers preceded by "T:" refer to pages of the trial transcript not included in the Joint Appendix.

Malpeso has substantial claims on the merits; (c) he faces a **95 year sentence**; (d) the lateness is very slight; (e) this petition follows promptly after the belated revelation of the clerical error; and (f) time limits are not jurisdictional in criminal cases. *See Schacht v. United States*, 398 U.S. 58, 63-64 (1970); *Sanabria v. United States*, 437 U.S. 54 (1978). Indeed, in the circumstances of this case, we respectfully submit that any other result would work manifest injustice to Malpeso, and could not be harmonized with traditional notions of fundamental fairness.

Constitutional and Statutory Provisions

The constitutional and statutory provisions involved in this petition appear at 47a-51a. They are as follows:

FED. R. EVID. 401, 403

18 U.S.C. §§ 922(g)(1), 924(a)(2), 924(c)(1), 1959

U.S. CONST. AMENDS. V, VI

U.S.S.G. § 1B1.2(d) and APPLICATION NOTE 5

Jurisdiction in the District Court

The United States District Court for the Eastern District of New York (Dearie, D.J.) had jurisdiction under, *inter alia*, Title18, United States Code.

Statement of the Case

This is a case like none the Court has ever seen. After all, how often does the head of an FBI investigation himself come under criminal investigation for misconduct in the very case before the Court? Even more remarkable, Supervisory Special Agent Lindley R. DeVecchio's corrupt alliance with informant Gregory Scarpa is not only **conceded by the government**, but goes to the question at the very heart of the case: whether or not there was, in fact, a "War" within the alleged Colombo Crime Family? *See, e.g., United States v. Orena*, 32 F.3d 704 (2d Cir. 1994); *United States v. Brady*, 26

F.3d 282 (2d Cir.), *cert. denied*, __ U.S. __, 115 S. Ct. 246 (1994) (both describing alleged Colombo Family "War").

Specifically, the *sine qua non* of the present prosecution was the government's claim that defendant Louis Malpeso participated in certain murders and murder conspiracies, and possessed guns in that connection, as part of a factional "War" for control of the Family. In contrast, Malpeso sought to defend on the theory (a) that there was **no** such "War," but only a coup by DeVecchio and Scarpa, and thus (b) that the shootings were committed, and the guns were possessed, solely for defensive purposes, rather than to Amaintain or increase" position in the Family, as required by the statute in question, 18 U.S.C. § 1959.

Yet, in barring **all** evidence of Agent DeVecchio's illicit relationship with Scarpa, the Trial Court deprived Malpeso of an opportunity to present this defense. To compound that error, the government unfairly exploited the Court's ruling by making factual assertions that the evidence would have rebutted. In these circumstances, with the theory of prosecution unchallenged, Malpeso's conviction was a foregone conclusion.

In two prior "Colombo War" trials, where proof concerning the Scarpa-DeVecchio affair was **admitted** in whole or in part, the juries accepted the defense position that there **was no** "War" and **acquitted** all defendants – tribute to the evidence's astonishing potency. *United States v. Cutolo*, 93 Cr. 1230 (EHN) (E.D.N.Y.); *United States v. Victor M. Orena*, 93 Cr. 1366 (ERK) (E.D.N.Y.). In this case, in identical circumstances, Malpeso sought to offer the **very same evidence and argument**. Unaccountably, however, the Trial Court flatly rebuffed that effort. As a result, the jury voted a partial **conviction**, and Malpeso will die behind bars. There is something viscerally troubling about this incongruity.

Statement of Facts

I. INTRODUCTION

Unlike so many other alleged "organized crime" cases, the murder prosecution of Louis Malpeso was **not** founded upon the defendant's own tape-recorded words. Rather, the government relied upon accomplice testimony by the triggermen themselves: Anthony and Christopher Liberatore, a father-son team of career con men and Mafia "wannabes" with every reason falsely to accuse Malpeso.

Even more than most, the Liberatores were singularly ill-suited for the role of cooperating witnesses. Indeed, their testimony was so evasive, and they were so incapable of getting their stories straight, that the government took the extraordinary steps of (a) completely renouncing Anthony Liberatore in summation, (b) disavowing significant parts of Christopher Liberatore's testimony as inconsistent with the minimal, non-accomplice proof, and (c) totally recasting its theory and constructing a revisionist hypothesis of events in a last gasp effort to save the case.

It is hardly surprising, then, that **the jury deadlocked with respect to substantial portions of the indictment**. Thus, while we do not challenge the sufficiency of the evidence, there can be no doubt that this was an extremely close case – one in which the improperly excluded "Scarpa-DeVecchio" proof could, and probably would, have tipped the balance.

At bottom, Malpeso's prosecution resolved into a simple murder case. The trial evidence focused primarily upon two events: (i) the December 8, 1991 killing of Matteo Speranza, by Christopher Liberatore with the aid of his father; and (ii) the June 4, 1992 shooting of Thomas McLaughlin and Daniel Norden, by Christopher Liberatore and, allegedly, codefendant Robert Gallagher. Significantly, the jury **failed to reach agreement** on the counts involving the Speranza homicide. As such, the verdict turned upon the **single criminal episode** of the McLaughlin/Norden shootings.

II. THEORIES OF PROSECUTION AND DEFENSE

A. *THE GOVERNMENT'S THEORY*

The government's trial theory was very straightforward. In essence, it sought to portray the victims as casualties of a larger "War" between two factions fighting for control of the Colombo Family: the Orena side and the Persico side. More precisely, the government alleged that Malpeso was a "made member" or "soldier" of the Family, allied with the Orena camp. As part of the Orenas' "War" effort, Malpeso supposedly ran a "crew" of Aassociates" or aspiring members – including, for a time, both Liberatores. According to the government's theory, this "crew" was, in fact, a roving hit squad that regularly hunted for Persico loyalists, but rarely, if ever, located any. In his supervisory capacity, Malpeso allegedly (i) directed the Liberatores to carry out the Speranza killing, and (ii) was present for, and gave Christopher Liberatore a gun used in, the McLaughlin/Norden shootings. (*See generally* A: 61-71)

Hence, the government's theory sounded in vicarious liability. There was no dispute that the Liberatores themselves – and particularly Christopher Liberatore – actually committed the shootings on trial. Nonetheless, the government sought to impute those shootings to Malpeso upon the Liberatores' claim that Malpeso had, in effect, put the gun in their hands and ordered them to pull the trigger. This being so, the case rose and fell on the Liberatores' credibility. As the prosecutor herself argued to the jury: "If you believe Chris Liberatore ..., then you'll convict.... If he's lying ..., then you acquit." (T: 2847, 2955) These facts have determinative impact on any harmless error inquiry.

B. *MALPESO'S THEORY*

Stripped of the "Scarpa-DeVecchio" evidence, Malpeso could not meet the government's "War" theory head on, and thus was relegated to attacking the Liberatores' credibility. To this end, he assailed them as professional con artists who were setting him up to deflect blame from themselves and curry

favor with the government. In support of this view, cross-examination showed that the Liberatores relentlessly contradicted each other, their prior trial testimony and debriefing statements. Accordingly, Malpeso argued that they had changed their stories with an eye toward (i) securing convictions; (ii) tailoring their testimony to achieve maximum congruity and minimum inconsistency; and (iii) insulating their immediate family members, whom they had recklessly enmeshed in their crimes, from prosecution.

III. THE MCLAUGHLIN/NORDEN SHOOTINGS

Given the hung jury on the counts regarding the Speranza murder, the key to the verdict was a single shooting episode that occurred on June 4, 1992, in a park near Avenue P in Brooklyn. According to Christopher Liberatore, the incident unfolded as follows:

> A. Allegedly, Chris Liberatore, Malpeso, Gallagher, Joe Scopo and Sal Miciotta drove to the park to hunt for Persico loyalist Thomas McLaughlin. (T: 512-13)
>
> B. On the way, Malpeso allegedly Ahanded [Chris Liberatore] a" gun – specifically, "a Davis .380" – and "said if anything happened [he (Chris Liberatore)] and Bobby [Gallagher] were going to be the shooters." (T: 513)
>
> C. Upon arrival, Chris Liberatore and/or Gallagher allegedly shot McLaughlin in the shoulder. (T: 513-25)
>
> D. In addition, errant bullets seriously, but not mortally, wounded Daniel Norden, a bystander. (*Id.*)
>
> E. Afterwards, Chris Liberatore disposed of the Davis .380 in a nearby sewer. (T: 514-15)

With respect to this episode, the government claimed that Malpeso "Aaided and abetted th[e] ambush by providing one

of the guns that was used." (T: 2950) As to Malpeso, then, there were two questions for the jury to answer: **first**, whether he was present and, **second**, whether he gave Chris Liberatore a gun? There were serious problems with both of these propositions. As the government itself conceded, the A**evidence [wa]s inconsistent with what [Christopher Liberatore] testified to.**" (T: 2943) (Emphasis supplied)

First, the **sole** corroboration for Malpeso's presence was the testimony of a **single** eyewitness, Lisa Lindley. And she swore that the only person even remotely resembling Malpeso sat in the **front** seat, rather than the **back**, as Chris Liberatore had maintained. (T: 512, 2009, 2951)

Second, the **lone** gun recovered from the sewer was a **Bryco Arms, not** a Davis .380, as Chris Liberatore had insisted. (T: 933-35, 2953)

Third, contrary to Chris Liberatore's claim that he "fired into the ground and the bullet must have ricochet[]ed" and hit Norden, eyewitness Steven Hoff testified that he saw Chris Liberatore raise his gun, aim and fire directly into the crowded park. (T: 931-33, 2309-13, 2949, 3137-38) This was further proof that Chris Liberatore was lying to minimize his culpability and bolster his own credibility with the jury. Indeed, even the prosecutor was forced to admit that Hoff's testimony was "[p]lainly ... inconsistent with what both Lisa Lindley ... and Christopher Liberatore t[old] you." (T: 2949)

Fourth, whereas Chris Liberatore testified that the alleged shooters Apulled up next to" McLaughlin's car and fired, Lindley said that they fired from "behind." (T: 513, 2010, 2944-46) Thus, "although [she] contradict[ed] Chris Liberatore in terms of when the first shot was fired," the government was left to speculate that Lindley must have been "right" and Chris Liberatore "wrong" on this score, in that his version would have made for "an odd angle" of trajectory and an A[un]likely pattern of ricochet" with respect to Norden. (T: 2944-45)

Fifth, while Chris Liberatore claimed that Gallagher fired the first shot, Hoff maintained that it was Chris Liberatore who shot first. (T: 513, 2293-2300, 3135)

Sixth, while Chris Liberatore said that Gallagher was in the back seat and he was in the middle, Hoff testified that Chris Liberatore fired from the **front** seat. (T: 512, 2947, 2951-52, 2293-3300, 3135) The government sought to explain this discrepancy by contending that "Steve Ho[ff] is wrong about what seat Chris Liberatore came out of." (T: 2952) On cross-examination, however, it was Chris Liberatore who confessed that he could not have been sitting in the middle of the back seat because his shots would have hit Gallagher in the face. (T: 923)

Seventh, as the prosecutor herself acknowledged, the physical evidence was tainted because the investigating officers deviated from standard "procedure and regulations." In particular, shell casings were disturbed and perhaps lost, and no crime scene photographs were taken. (T: 2036-38, 2942)

Hence, as conceded by the government itself, there were major "variations between what the eyewitness[es] testified to ... and what Chris Liberatore testified to" in connection with the McLaughlin/Norden shootings. (T: 2939) Rarely has a **95 year** sentence rested upon such thin evidence.

Reasons For Granting The Petition

I. THE TRIAL COURT VIOLATED DEFENDANT'S RIGHT TO PRESENT A DEFENSE WHEN IT ERRONEOUSLY BARRED PROOF (A) THAT THE KEY PLAYER IN THE ALLEGED "COLOMBO FAMILY WAR" WAS ACTUALLY A GOVERNMENT INFORMANT, AND (B) THAT THE LEAD FBI AGENT ASSIGNED TO THIS CASE WAS UNDER CRIMINAL INVESTIGATION FOR HIS CORRUPT RELATIONSHIP WITH THE INFORMANT

A. *INTRODUCTION*

In this **POINT**, we challenge the Trial Court's refusal to admit evidence of an extraordinary law enforcement debacle: proof that (i) the most active and violent participant in the alleged "Colombo Family War," Gregory Scarpa, Sr., was actually a government informant, and (ii) the supervising FBI agent assigned to this case, Lindley R. DeVecchio, was under criminal investigation for his illicit dealings with Scarpa. Armed with this compelling and **undisputed** evidence, the *Cutolo* and *Victor M. Orena* defendants won complete **acquittals**. Yet, in **identical circumstances** here, Judge Dearie somehow found the same arguments and evidence to be irrelevant, wholly excluded them, and the jury returned a partial **conviction**. In our view, there can be only one explanation for this radical divergence: the Trial Court – and later, in affirming for substantially similar reasons, the Court of Appeals – usurped the role of the jury and made an improper credibility determination. *See, e.g., DiBlasio v. Keane*, 932 F.2d 1038, 1043 (2d Cir. 1991) (Credibility of defense "is a question reserved for the **jury** as fact-finder") (Citation omitted) (Emphasis supplied).

B. *AN OVERVIEW OF THE GOVERNING LAW*

Several familiar legal principles inform our arguments in this **POINT**.

First, "the Constitution guarantees criminal defendants the right to present a defense," *United States v. Blum*, 62 F.3d 63, 67 (2d Cir. 1995) (*citing United States v. Almonte*, 956 F.2d 27 (2d Cir. 1992); *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038 (1973)), to **every** element of the charges against them. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970) (Due Process requires "proof beyond a reasonable doubt of every fact necessary to constitute" the charged offense).

Second, as a corollary of this fundamental right, "[a] criminal defendant is entitled to a jury charge that reflects **any** defense theory for which there is a foundation in the evidence." *United States v. Johnson*, 994 F.2d 980, 988 (2d Cir.), *cert. denied*, 510 U.S. 959, 114 S. Ct. 418 (1993) (*citing United States v. GAF Corp.*, 928 F.2d 1253, 1262 (2d Cir. 1991)) (Emphasis supplied).

Significantly, questions as to the plausibility of a defense theory go to weight rather than admissibility, and thus are for the **jury** as opposed to the Court. Hence, the issue is **not** whether the Trial Court would credit the defense theory were it sitting as the trier-of-fact, but merely whether the defense theory constitutes a permissible inference that **might** be drawn by a rational jury. In other words, "a criminal defendant is entitled to instructions relating to his theory of defense, for which there is **some** foundation in the proof, **no matter how tenuous that defense may appear to the trial court**." *United States v. Dove*, 916 F.2d 41, 47 (2d Cir. 1990) (Emphasis supplied); *see, e.g., United States v. Pedroza*, 750 F.2d 187, 205 (2d Cir. 1984) ("'[a] criminal defendant is entitled to have instructions presented relating to **any theory** of defense for which there is **any** foundation in the evidence, **no matter how weak or incredible that evidence may be**'") (*quoting United States v. O'Connor*, 237 F.2d 466, 474 n.8 (2d Cir. 1956)) (Emphasis supplied).

Third, for pretrial purposes, an offer of proof, such as that made by Malpeso below, serves as the functional equivalent of evidence, and – unless insupportable on its face – must be

accepted as true. *See, e.g., United States v. Mejias*, 552 F.2d 435, 443 (2d Cir.), *cert. denied*, 434 U.S. 847, 98 S. Ct. 154 (1977) (District Court properly "accepted the facts as stated in appellants' offers of proof as true").

Fourth, evidence offered by an accused for defensive purposes, *e.g.*, to negate an element of the offense, is governed by an **easier** admissibility standard than prosecution evidence. Specifically, prejudice under Rule 403 is **not** a factor in such circumstances. *See, e.g., United States v. Aboumoussallem*, 726 F.2d 906, 911-12 (2d Cir. 1984); *Government of the Virgin Islands v. Carino*, 631 F.2d 226, 230 (3d Cir. 1980) ("[E]vidence produced by the defense cannot have a prejudicial effect to the defendant, and there should be no balancing of prejudice to the prosecution") (Citations and internal quotes omitted).

Fifth, it is well-settled that the issue of a witness' bias and motive is "**always** relevant," *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110 (1974) (Emphasis supplied) (Citation and internal quotes omitted), **never** "collateral," and thus subject to proof by "extrinsic evidence." *United States v. Harvey*, 547 F.2d 720, 722 (2d Cir. 1976).

With this analytical framework in mind, we turn to the substance of our argument.

C. *THE NATURE OF THE "SCARPA/DEVECCHIO" EVIDENCE*

Scarpa, a Colombo Family captain allegedly aligned with the Persico camp, was a pivotal figure in the supposed factional war. Simply put, he was at the center of the war's landmark events. For example, in June of 1991, Scarpa's closest associate and protégé, Carmine Sessa, shot at alleged Orena faction leader Victor J. Orena himself, touching off a long, hot summer of simmering tension in the Family. (*See, e.g.*, T: 222-30; A: 128) Then, in November of 1991, Scarpa became the first casualty of the war's "shooting phase," surviving an alleged attempt on his life by the Orena side. (*See, e.g.*, T: 262; A: 129) Over the next year or so, Scarpa killed or

attempted to kill no less than **14** of Orena's alleged allies – crimes that the government sought to attribute to the Persicos. (A: 126) These included at least four murders, as well as **numerous attempts to murder Malpeso himself**. (A: 74-75, 91, 102-05, 141) Thus, as even the prosecutor allowed, "**Greg Scarpa was a very active participant in the war. He was by far the most vicious killer during the war**." (A: 139) (Emphasis supplied)

Malpeso's **uncontroverted** offer of proof as to Scarpa and Agent DeVecchio consisted of, *inter alia*, the following:

1. *The Pre-"War" Years*

Scarpa had been a valuable informant since at least the early 1960s. With the FBI's knowledge and assistance, he murdered, stole, loansharked, counterfeited, extorted and dealt drugs all the while. (A: 73-74, 109-116, 155)

2. *Facts Common To Both The Pre-*"War" And The "War"Years

It was a widely held belief within the Family that Scarpa was an informant, and/or that he had a law enforcement source. (A: 108-16, 125)

3. *The "War" Years*

a. **Knowing full well that Scarpa was actively murdering alleged Orena supporters, Agent DeVecchio not only failed to arrest him, but fed Scarpa the address of Victor J. Orena himself, as well as those of other alleged Orena loyalists – a virtual license to kill.** In addition, Agent DeVecchio advised Scarpa that certain of Orena's supposed followers were forming Ahit teams." Predictably, Scarpa used this confidential information to stalk, and in some cases shoot, the individuals in question. (A: 76, 111)

b. In February 1992, case agent Christopher Favo, who sat at the prosecution's table and testified

at trial, heard Agent DeVecchio tell Scarpa that one of Scarpa's supposed confederates, Carmine Imbriale, was cooperating with law enforcement, thus compromising Imbriale's safety. (A: 76, 146-48)

c. In or about March through August 1992, agents Favo and DeVecchio intervened to save Scarpa from arrest on a New York State gun charge. Meanwhile, Scarpa remained at large and continued his killing spree. (A: 91-22, 136-37, 148-49, 151)

d. Agent DeVecchio asked Agent Favo to provide him with addresses for certain individuals. Agent Favo later learned that these individuals were Scarpa's loansharking victims. Agent DeVecchio gave the addresses to Scarpa, thereby aiding Scarpa's loansharking activities. (A: 76)

e. After Agent DeVecchio learned that Scarpa had killed yet another alleged Orena victim, Agent Favo saw Agent DeVecchio "slap[] his hand on the desk" and exclaim in "excite[ment]," "[w]e're going to win this thing [i.e., the 'War']." (A: 76, 91, 134, 150) (Emphasis supplied)

f. Fully aware that they had assisted Scarpa in several murders, Agent DeVecchio nonetheless warned Scarpa that there were outstanding arrest warrants for Scarpa crew members Lawrence Mazza and James DelMasto. Thereafter, Scarpa told Mazza and DelMasto, then fugitives, to stay away. And, of course, Agents DeVecchio, Favo and their colleagues still took no steps to apprehend Scarpa himself. (A: 76, 151)

g. On or about June 26, 1992, Agent DeVecchio – incensed that Scarpa had almost been arrested by local police – directed Agent Favo and the rest of the "Colombo Squad" to suspend all further arrests without his express permission. (A: 152)

> h. In violation of Justice Department rules, Agent Favo and his brother agents waited a full 18 months, until January 1994, to report Scarpa's and Agent DeVecchio's misconduct. Their belated disclosures prompted internal and criminal investigations. (A: 76, 108, 137-38, 155-56)
>
> ***

This evidence speaks for itself. Plainly, Agent DeVecchio was indelibly compromised by his relationship with Scarpa. In short, Agent DeVecchio – and, to a somewhat lesser extent, Agent Favo and the other members of the "Colombo Squad" – abdicated their professional responsibilities and personally injected themselves in the alleged "War." At best, they closed their eyes to Scarpa's violence and let him wreak havoc. At worst, they served as silent but deadly partners in his mayhem by keeping him out of jail and on the streets; **leaking the identities and locations of potential murder victims and cooperating witnesses**; and generally obstructing justice. As we show *infra*, Malpeso could have used this proof to devastating advantage – an advantage that carried the day in the *Cutolo* and *Victor M. Orena* trials.

D. *THE RULINGS BELOW*

With only the barest explanation, the Trial Court granted the government's *in limine* motion to preclude the "Scarpa/DeVecchio" evidence, holding that it was (i) irrelevant under Rule 401, and (ii) otherwise inadmissible under Rule 403. Accordingly, the Court directed Malpeso "to make no reference to Mr. Scarpa's status as an informant, his status as an informant to the FBI, or any reference to any of the matters that are currently presumably the subject of intense investigation elsewhere." (A: 174) On appeal, the Second Circuit affirmed on substantially identical grounds. (10a-14a) As we now explain, neither of the articulated reasons for excluding the "Scarpa/DeVecchio"proof – irrelevance or unspecified Rule 403 concerns – can withstand scrutiny.

E. *THE REASONS WHY THE LOWER COURTS ERRED*

1. *THE EVIDENCE WAS RELEVANT AND ADMISSIBLE UNDER RULE 401*

Contrary to the lower courts' view, Malpeso advanced several cogent theories of relevance for the "Scarpa/DeVecchio" proof – theories that persuaded at least two other courts to permit the evidence, and should have prevailed here, as well.

a. *THE EVIDENCE WAS RELEVANT TO ESTABLISH THE THEORY OF DEFENSE*

Malpeso first argued that the AScarpa/DeVecchio" proof was relevant to support a defense of self-preservation and lack of intent – the very defense that **won** the *Cutolo* and *Victor M. Orena* cases. In substance, the argument and the prospective defense went as follows:

> i. Section 1959 of Title 18, United States Code, requires a showing that the defendant acted "**for the purpose of ... maintaining or increasing position in an enterprise engaged in racketeering activity**," here, the Colombo Family. 18 U.S.C. § 1959 (Emphasis supplied).
>
> ii. Emboldened by his relationship with Agent DeVecchio, Scarpa believed that he could kill with impunity – a belief that manifested itself in his voracious appetite for brutality.
>
> iii. Scarpa's informant status, and/or the fact that he had a law enforcement source, were "common knowledge" within the Family. (A: 108-16, 125) Accordingly, such knowledge could be imputed to Malpeso as an alleged member of the Family. *See United States v. Certain Real Property and Premises, Known as 890 Noyac Road, Noyac, New York*, 945 F.2d 1252, 1260 (2d Cir. 1991) (Evidence of occupant's general reputation as a drug deale

properly admitted to establish landowner's knowledge of occupant's drug sales, despite absence of proof that landowner knew of the reputation in general or the sales in particular).

iv. To that extent, it could be inferred that Malpeso knew of Scarpa's belief that he had *carte blanche* to kill. And, when coupled with Scarpa's demonstrated ability and willingness to carry out that belief, such knowledge frightened Malpeso. *See United States v. Russo*, 708 F.2d 209, 214 (6th Cir.) (evidence of defendant's general mafia reputation properly admitted to establish extortion victim's state of fearfulness), *cert. denied*, 464 U.S. 993, 104 S. Ct. 487 (1983); *United States v. Tropiano*, 418 F.2d 1069, 1081 (2d Cir. 1969) (bad reputation evidence properly admitted to show extortion victim's fear), *cert. denied*, 397 U.S. 1021, 90 S. Ct. 1258 (1970). **This was especially so because Malpeso had been the target of murder attempts by Scarpa**. (A: 103-05, 141)

THEREFORE:

v. Malpeso acted out of fear – *i.e.*, to protect himself from Scarpa and his cohorts – and **not** to Amaintain or increase" his position in the Family, as required by the statute. As Judge Dearie himself put it, "**we're interested in staying alive. That's the defense, and that's our sole motivation.... [And] [i]f they [defendants] are not motivated by maintaining or increasing their position, you [the government] have no case**." (A: 124, 127) (Emphasis supplied)

While the present circumstances are *sui generis*, there is strong authority for the proposition that the "Scarpa/DeVecchio" evidence should have been admitted (i) to establish the self-preservation defense, and (ii) to negate § 1959's intent element. *United States v. McClure*, 546 F.2d 670 (5th Cir. 1977), is strikingly on point. There, as here, McClure asserted that he was "**terrified**" of an **informant**, Carroll, and likewise sold drugs only "because he was **afraid** not to" do so. *Id.* at 672 (Emphasis supplied). Nonetheless,

the trial court barred testimony that Carroll "had **intimidated** [others] into selling" drugs, rejecting McClure's identical claim "that it was **relevant to prove [his] lack of intent**...." *Id.* at 671, 672 (Emphasis supplied). In peculiarly apt language, the Fifth Circuit reversed, holding that

> **evidence of a systematic campaign of threats and intimidation against other persons is admissible to show lack of criminal intent by a defendant**.... [I]n the case before us it was the defendant who sought to introduce evidence of the **informant's scheme. His right to present a vigorous defense required the admission of the proffered testimony**. The fact that it referred exclusively to threats made by Carroll after the sales by appellant affects its **weight but not its admissibility**.
>
> **We intimate no opinion as to the credibility of appellant's ... defense. We decide only that a jury could not properly convict him absent the opportunity to hear the proffered testimony bearing upon his theory of defense** and weigh its credibility along with the other evidence in the case.

546 F.2d at 672-73 (Emphasis supplied) (Footnote omitted).

Hence, under Rule 401's liberal and generous standard, evidence is *per se* relevant – though not necessarily admissible given Rule 403's balancing hurdle – where, as here, it is offered to rebut an element of the crime, such as intent. *See Old Chief v. United States*, 117 S. Ct. 644, 649-50 (1997); *Montana v. Egelhoff*, 116 S. Ct. 2013, 2016-17 (1996). As in *McClure*, evidence of Scarpa's "systematic campaign of threats and intimidation," 546 F.2d at 672 – driven by Agent DeVecchio's corrupt assistance – would have done just that.

In ruling otherwise, Judge Dearie necessarily must have delved into the "credibility" of the self-preservation defense – a question of "weight but not ... admissibility," which is off limits for the Trial Court. *McClure*, 546 F.2d at 673. Accordingly, *McClure* alone compels the conclusion that Malpeso's

"right to present a vigorous defense required the admission of the proffered testimony," as it was quintessentially relevant. *Id.*

Accepting this argument, Eastern District Judge Edward Korman not only received the Scarpa/DeVecchio evidence in the *Victor M. Orena* trial, but gave the jury an explicit instruction on the Aself-preservation/no intent" defense. (A: 88, 92) (Emphasis supplied)

By virtue of his presumptively truthful offer of proof, Malpeso plainly would have been entitled to a similar instruction here – *i.e.*, one that "specifically enunciated the[] defense theory." *Pedroza*, 750 F.2d at 204. Indeed, Malpeso requested such a charge, but, absent the "Scarpa/DeVecchio" proof, there was no evidentiary basis for one. (T: 2739-42, 2791-92)

Thus, beyond its refusal to permit proof and argument on the "Scarpa/DeVecchio" issue, the Trial Court exacerbated its error by denying Malpeso Athe opportunity" to seek a jury instruction "bearing upon [his self-preservation/no intent] theory of defense." *McClure*, 546 F.2d at 673. In combination, these errors eviscerated Malpeso's right to present a defense, and rendered his trial fundamentally unfair – especially relative to those of the **acquitted** defendants in Cutolo and Victor M. Orena.

b. *THE EVIDENCE WAS RELEVANT TO DISCREDIT THE INVESTIGATION AND EXPOSE THE TESTIFYING AGENTS' BIAS AND MOTIVE*

In addition, Malpeso argued that the "Scarpa/DeVecchio" evidence was admissible (i) to impeach the quality of the government's investigation, and (ii) to establish the bias and motive of the FBI agents who testified against him. As noted, these traits are "**always** relevant," *Davis v. Alaska*, 415 U.S. at 316, 94 S. Ct. at 1110 (Emphasis supplied) (Citation and internal quotes omitted), **never** "collateral" and thus subject to proof by "extrinsic evidence." *Harvey*, 547 F.2d at 722.

Inexplicably, the Second Circuit's opinion completely ignored this claim.

Obviously, as discussed above, the "Scarpa/DeVecchio" evidence raises serious questions about the conduct of the investigation's crucial figures: supervisor DeVecchio, and case agent Favo, who sat at the prosecution's table and was knee-deep in his superior's misdeeds. *A fortiori*, then, the evidence would have cast grave doubt on the integrity of the investigation as a whole. As such, it would have fueled a blistering cross-examination of **all** the "Colombo Squad" agents who testified at trial, and of case agent Favo in particular.

As this Court has recently reaffirmed, a "'common trial tactic of defense lawyers is to discredit the caliber of the investigation.'" *Kyles v. Whitley*, 115 S. Ct. 1555, 1572 (1995) (*quoting Bowen v. Maynard*, 799 F.2d 593, 610 (10th Cir. 1986)). In *Kyles*, the prosecution suppressed evidence that would have cast an unfavorable light on a murder investigation; specifically, proof that informant Beanie, similar to Scarpa here, guided the investigation to shift suspicion away from himself and onto the defendant. Reversing the conviction, the Court made clear that such evidence was "material," and thus intrinsically relevant:

> Beanie's various statements would have raised opportunities to attack ... the thoroughness and even the good faith of the investigation.... Their disclosure would have revealed **a remarkably uncritical attitude on the part of the police**.
>
> ***
>
> [T]he defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked **the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted**....
>
> ***

> By demonstrating the detectives' knowledge of Beanie's affirmatively self-incriminating statements, the defense could have laid the foundation for **a vigorous argument that the police had been guilty of negligence**.... Since the police admittedly never treated Beanie as a suspect, the defense could thus have used his statements **to throw the reliability of the investigation into doubt and to sully the credibility of Detective Dillman, who testified [for the State at trial]**.
>
> The admitted failure of the police to pursue these pointers toward Beanie's possible guilt ... would have supported the defense's theory that **Beanie was no mere observer, but was determining the investigation's direction and success[, thus creating tremendous] potential for damage from using Beanie's statement to undermine the ostensible integrity of the investigation....**

115 S. Ct. at 1571-72 (Emphasis supplied). Plainly, then, the "Scarpa/DeVecchio" evidence was equally relevant to attack the *bona fides* of Malpeso's investigation. The lower courts' contrary ruling directly clashes with *Kyles*.

Further, the excluded proof would have ignited a powerful argument that the testifying agents were seeking convictions to vindicate (i) the tainted investigation and the "Colombo Squad" in general, (ii) their fallen comrade, Agent DeVecchio, in particular, and (iii) their own misconduct in facilitating and covering up Agent DeVecchio's wrongdoing. Put another way, the "Scarpa/DeVecchio" evidence would have exposed all the agents – and especially Agent Favo – to withering impeachment on the grounds of bias and motive. Courts have reversed convictions where trial judges rejected similar defense arguments. *See, e.g., United States v. Salerno*, 937 F.2d 797, 809 (2d Cir.), *modified on other grounds*, 952 F.2d 623, *amended on other grounds*, 952 F.2d 624 (1991), *rev'd on other grounds*, 505 U.S. 312, 112 S. Ct. 2503 (1992), *on remand*, 974 F.2d 231 (2d Cir.), *vacated on other grounds*, 8

F.3d 909 (1993); *United States v. Hitchmon*, 609 F.2d 1098 (5th Cir. 1979).

2. *THE EVIDENCE WAS NOT INADMISSIBLE UNDER RULE 403*

Beyond deeming the "Scarpa/DeVecchio" evidence irrelevant under Rule 401 – itself an error of constitutional magnitude – the Trial Court opined that it was barred by amorphous "[Rule] 403 implications." (A: 167) With little or no elaboration, the Second Circuit agreed. (12a-14a) This position fails.

First, where, as here, an accused offers relevant evidence for defensive purposes, *e.g.*, to negate an element of the charge(s), "prejudice [to] the government" is **not** a factor in the Rule 403 calculus. As the Second Circuit stated in *United States v. Aboumoussallem*:

> [T]he standard of admissibility when a criminal defendant offers ... evidence as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword.
>
> ***
>
> **[R]isks of prejudice are normally absent when the defendant offers [such] evidence ... to prove some fact pertinent to the defense**.... In such cases the **only** issue arising ... is whether the evidence is relevant to the existence or non-existence of some fact pertinent to the defense.

726 F.2d at 911-912 (Emphasis supplied) (Footnotes and citations omitted); *Government of the Virgin Islands v. Carino*, 631 F.2d at 230 ("E]vidence produced by the defense cannot have a prejudicial effect to the defendant, and there should be no balancing of prejudice to the government") (Citations and internal quotes omitted). Thus, in affirming here, the Second Circuit jettisoned its own precedent.

Second, with respect to the government's purported trial management and jury confusion concerns – *i.e.*, the fear that

the trial would disintegrate into a collateral Aminitrial" on the "Scarpa/DeVecchio" imbroglio – we suggest a simple answer: **two prior trials involving the very same issue (*Cutolo* and *Victor M. Orena*) went off without a hitch**. Hence, the only real risk of prejudice or confusion here was the risk of an **acquittal**. Obviously, that concern is not cognizable under Rule 403.

Third, any theoretical risk of prejudice or confusion could have been cured by a simple limiting instruction – the kind that is routinely given when the government introduces, for example, Rule 404(b) evidence. Of course, juries are presumed to follow such instructions. *See, e.g., Old Chief*, 117 S. Ct. at 658 (O'Connor, J., dissenting) (citing *Shannon v. United States*, 512 U.S. 573 (1994)). Indeed, Judge Korman gave one in the *Victor M. Orena* trial that more than adequately protected the government's interests:

> The fact that Special Agent DeVecchio may have been guilty of gross misconduct, which may have even amounted to a violation of the criminal laws, or that F.B.I. agents should have reported their suspicions of his misconduct earlier, would not provide a basis for finding any of these defendants not guilty, if the evidence persuades you that they are guilty of the crimes charged beyond a reasonable doubt.

(A: 93)[2]

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2 In fact, juries are routinely called upon to make far more subtle and complex distinctions than would have been required here. In narcotics cases, for example, jurors are frequently asked to consider evidence of prior drug sales – often strikingly similar to those on trial – for the purpose of establishing background, motive or intent, but **not** substantive guilt. *See, e.g., United States v. Teague*, 93 F.3d 81, 84 (2d Cir. 1996); *United States v. Pitre*, 960 F.2d 1112, 1117-20 (2d Cir. 1992); *United States v. Roldan-Zapata*, 916 F.2d 795, 804 (2d Cir. 1990), *cert. denied*, 499 U.S. 940, 111 S. Ct. 1397 (1991). Given the obvious difficulty of compartmentalizing such evidence, it is folly to suggest that Malpeso's jury could not have performed a similar gymnastic here.

Fourth, and more fundamentally, because the "Scarpa/DeVecchio" evidence was of the utmost relevance and importance to the defense, it **could not** have been prejudicial or confusing within the meaning of Rule 403. As one Court has put it, "relevant evidence is inherently prejudicial; but it is only **unfair** prejudice, **substantially** outweighing probative value, which permits exclusion of relevant matter under Rule 403." *United States v. McRae*, 593 F.2d 700, 707 (5th Cir.), *cert. denied*, 444 U.S. 862, 100 S. Ct. 128 (1979) (Emphasis supplied); *accord Old Chief*, 117 S. Ct. at 656 (O'Connor, J., dissenting) (collecting cases). Similarly, as recognized in *United States v. Blum*, 62 F.3d 63 (2d Cir. 1995), "given the importance of the ... testimony to the defense, **whatever confusion that may have resulted from its admission would have to have been overwhelming to satisfy Rule 403's balancing test**." *Id.* at 68 (Emphasis supplied) (*citing Harvey*, 547 F.2d at 723). Put simply, the government did not begin to approach such a showing here.

By any measure, then, the Trial Court further erred in precluding the "Scarpa/DeVecchio" evidence under Rule 403 – an error that gutted Malpeso's defense and his right to a fair trial.

II. MALPESO'S SENTENCE MUST BE VACATED BECAUSE U.S.S.G. § 1B1.2(d) IS UNCONSTITUTIONAL

Malpeso's 95 year sentence was driven by the Count One "War" conspiracy conviction. As noted, that Count charged him with conspiring to murder multiple but **unnamed** "members of the Persico faction." (A: 65-66) Accordingly, Guidelines § 1B1.2(d) controlled the calculation of Malpeso's sentence. (A: 237) That Guideline states:

> A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

In the absence of a special verdict, the District Court turned to § 1B1.2(d)'s Application Note 5 to determine the object(s) of the Count One conspiracy; *i.e.*, to decide which of the unnamed Persico Amembers" Malpeso had allegedly conspired to kill. (A: 237) Application Note 5 provides:

> Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, **were it sitting as a trier of fact**, would convict the defendant of conspiring to commit that object offense.

(Emphasis supplied)

Employing the beyond a reasonable doubt standard mandated by Application Note 5, the District Court then concluded that Malpeso had conspired not only to commit the McLaughlin/Norden shootings, but also to kill, *inter alia*, Matteo Speranza and his two employers. (A: 230-37, 509) Importantly, **the District Court reached this conclusion even though the jury had refused to convict on the substantive, Speranza-related counts under the very same reasonable doubt standard**. Not surprisingly, the District Court's finding dramatically increased Malpeso's sentence, boosting his offense level from approximately 28 to approximately 47, subject to further enhancements and multiple count adjustments. (A: 238-43, 264-66, 507-09) When coupled with a criminal history score of III, this translated into a sentence of life imprisonment. (A: 243)

Relying upon cases from the Ninth and Tenth Circuits, we argued below that § 1B1.2(d), as interpreted by Application Note 5, runs afoul of the Sixth Amendment by impermissibly diluting the function of the jury. *See United States v. Garcia*, 37 F.3d 1359, 1371 n.4 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1699 (1995); *United States v. Bush*, 70 F.3d 557, 561-62 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 795 (1996). Joining

the Third, Fifth, Seventh and Eleventh Circuits, the Court of Appeals disagreed and upheld the Guideline's constitutionality. (21a-24a); *see United States v. Conley*, 92 F.3d 157 (3d Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1244 (1997); *United States v. Manges*, 110 F.3d 1162, 1179 n.16 (5th Cir. 1997); *United States v. Edwards*, 105 F.3d 1179 (7th Cir.), *petition for cert. granted on this issue*, 118 S.Ct. 334 (Oct. 20, 1997); *United States v. Ross*, 131 F.3d 970, 989-95 (11th Cir. 1997). Because this Court's decision in *Edwards* will resolve this issue, we respectfully ask the Court to reserve decision on Malpeso's petition pending *Edwards*' outcome.

CONCLUSION

This petition should be granted.

Respectfully submitted,

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On the Petition:
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**Counsel of Record*

Appendix A

Court of Appeals Decision

115 F.3d 155

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 922, 979 and 980 - August Term, 1996

(Argued: March 24, 1997 Decided: June 3, 1997)

Docket Nos. 96-1237,
96-1262 and 96-1263

UNITED STATES OF AMERICA,

Appellee,

v.

LOUIS MALPESO, aka Bobo; ROBERT GALLAGHER;
JOSEPH AMATO,

Defendants-Appellants,

Before:

NEWMAN, MINER and GODBOLD*, *Circuit Judges.*

*The Honorable John C. Goldbold of the United States Court of Appeals for the Eleventh Circuit, sitting by designation.

Defendants appeal from judgments entered in the United States District Court for the Eastern District of New York (Dearie, J.), convicting defendants of numerous offenses arising from their participation in a war between competing factions of the Colombo organized crime family and sentencing defendants. The offenses of conviction include acts of violence or conspiracies to commit acts of violence, for the

purpose of maintaining and increasing position in a criminal enterprise; using or carrying a firearm during a crime of violence; being a felon in possession of a firearm; and being an accessory after the fact.

Affirmed.

Judd Burstein, New York, NY (Marc Fernich, Burstein & Fass LLP, of counsel), for *Defendant-Appellant* Malpeso.

John L. Pollok, Hoffman & Pollok, New York, NY (Gerald L. Shargel, Jeffrey Lichtman, Michael S. Pollok, Hoffman & Pollok, New York, NY, of counsel), for *Defendant-Appellant* Robert Gallagher.

Valerie Caproni and Sung-Hee Suh, Assistant United States Attorneys, Brooklyn, NY (Zachary W. Carter, United States Attorney, Eastern District of New York, David C. James, Assistant United States Attorney, Brooklyn, New York, of counsel), for *Appellee*.

MINER, *Circuit Judge*:

Defendants appeal from judgments entered in the United States District Court for the Eastern District of New York (Dearie, Jr.), following a jury trial, convicting them of numerous offenses arising from their participation in a war between competing factions of the Colombo organized crime family. Defendant-appellant Louis Malpeso was convicted on four counts of acts of violence or conspiracies to commit acts of violence, for the purpose of maintaining and increasing position in a criminal enterprise, in violation of 18 U.S.C. § 1959, two counts of using or carrying a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1), and one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2). Malpeso was sentenced to a 95-year term of imprisonment, a 3-year term of supervised

release, restitution in the amount of $24,962.35, and a $350 special assessment. Defendant-appellant Robert Gallagher was convicted on four counts of violating 18 U.S.C. § 1959 and two counts of violating 18 U.S.C. § 924(c)(1), and was sentenced to a 39-year term of imprisonment, a 3-year term of supervised release, restitution in the amount of $13,740.00, and a $300 special assessment. Defendant-appellant Joseph Amato was convicted on one count of being an accessory after the fact to murder, in violation of 18 U.S.C. § 3, and, under a separate indictment and after a separate trial, one count of violating § 924(c)(1), and was sentenced to a 211-month term of imprisonment, a 3-year term of supervised release, restitution in the amount of $11,222.35, a fine of $50,000 and a $100 special assessment.

BACKGROUND

The charges in this case arose from an internal power struggle (the "Colombo war") between two rival factions of the Colombo Organized Crime Family of La Costa Nostra (the "Colombo Family" or the "family"): those loyal to Carmine Persico, the imprisoned family boss, and those loyal to Victor J. Orena, the acting boss of the family. We have chronicled on many occasions the events of the Colombo war, most recently in *United States v. Orena*, 32 F.3d 704 (2d Cir.1994) *United States v. Brady*, 26 F.3d 282 (2d Cir. 1994), *United States v. Scopo*, 19 F.3d 777 (2d Cir. 1994), *United States v. Amato*, 15 F.3d 230 (2d Cir. 1994), and *United States v. Orena*, 986 F.2d 628 (2d Cir. 1993). Thus, we will discuss only those events relevant to the prosecution giving rise to this appeal, all of which occurred between mid-1991 and 1994, when conflicts between the rival factions became violent.

Malpeso, Gallagher and Amato, all members of the Orena faction, were charged with crimes relating principally to two planned "hits" on Persico faction members that went awry. The first involved the killing of Matteo Speranza, a 17 year-old boy who worked in a bagel store believed to be owned by two Persico faction members (the "Speranza Murder"). The

second involved the shooting of Daniel Norden, a 16 year-old boy and innocent bystander, who sustained nearly fatal injuries (the "Avenue P shooting"). Additional evidence was presented at trial concerning other incidents in which one or more of the defendants were involved in plots or attempts to murder members of the Persico faction.

The charges were proved primarily through the testimony of an accomplice witness, Christopher Liberatore ("C. Liberatore"), who participated in several violent incidents with the defendants. C. Liberatore's testimony regarding the defendants' participation in the Colombo war was corroborated by tape-recorded conversations, law enforcement surveillance, evidence seized during searches, and the testimony of his father, Anthony Liberatore ("A. Liberatore"), another accomplice witness.

I. *The Speranza Murder*

Orena faction members met frequently at "Cafe on N", a social club owned by Joseph Scopo and operated by Gallagher, Craig Marino and John Baudanza (all Orena loyalists). In 1991, John Rosatti, also an Orena loyalist, came to Café on N to speak to Orena. Rosatti wanted Gregory Scarpa, Sr., a Persico faction member, killed because he had apparently abused one of Rosatti's employees. Subsequently, members of the Orena faction tried unsuccessfully to kill Scarpa, setting off an extended course of violence between the factions.

By late 1991, Orena loyalists had a standing order to kill anyone who was loyal to Persico. C. Liberatore was an "associate" in the Orena faction, as opposed to a full "member,"[1] and was assigned to follow Malpeso's orders. Malpeso was one of several members of the Orena faction

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[1] As we have observed in related cases, an associate in the Colombo Family is an individual who has not become a "made" member of the family, that is, formally inducted into the family, but who participates in the family's activities, typically with aspirations of becoming a made member. *See Brady*, 26 F.3d at 290; *Amato*, 15 F.3d at 232.

who followed Pasquale Amato ("Patty Amato"), a captain in the Colombo Family. Over the next few months, there were various shootings and murders involving the two factions, the facts of which were related by C. Liberatore at trial.

On December 6, 1991, C. Liberatore and Malpeso were at Café on N celebrating their birthdays when those present at the café learned that Vincent Fusaro, an Orena faction associate, had been killed by Scarpa and his crew. In response, a plan was devised by Malpeso and Amato to murder Persico loyalists Frank Guerra a/k/a "BF"and Anthony Ferrara the following night. In the early morning of December 8, 1991, Malpeso, Amato, the Liberatores and Tommy Cappa set out in three cars to find and kill Guerra and Ferrara. Malpeso drove a "safe car," a car in which no firearms were carried. A. Liberatore was driving a second car, with C. Liberatore as the shooter. Amato and Cappa were in Amato's car. Everyone but Malpeso was armed.

The hit team drove to Ferrara's house and then to Guerra's house, but found no activity at either, so they proceeded to Wanna Bagel, a shop believed to be owned by Ferrara and Guerra. At the bagel shop, the lights were on and a person was inside, but the hit team determined that it was neither Ferrara nor Guerra. The team drove back to Ferrara's house, and then to Guerra's house, where they decided to park and wait for Guerra's return. At this point, the team noticed a black Lincoln repeatedly, passing by them. Sensing that the automobile might contain enemies, they decided to move on, with the Lincoln trailing them. A few minutes later, C. Liberatore entered Malpeso's car to provide protection in case there was a gun fight with the Lincoln's occupants.

The Lincoln soon stopped following the group. However, when it turned away, the hit team followed, eventually ending up in a driveway. There, Malpeso ordered C. Liberatore to shoot the Lincoln's passengers, but C. Liberatore, with the support of Amato, declined. At this point, the team disbanded.

C. Liberatore and Malpeso went back to Malpeso's apartment. Shortly thereafter, Malpeso was informed by phone that

his sons had been shot. According to C. Liberatore's testimony, Malpeso indicated that he thought the people in the black Lincoln were responsible, and ordered C. Liberatore to go "get the guys in the black [Lincoln]," "go find Anthony [Ferrara] and [Guerra]," and "go kill the guys in the bagel store." (Tr. at 353). C. Liberatore called A. Liberatore, who picked him up at Malpeso's and agreed to help carry out Malpeso's orders.

The two Liberatores drove to Ferrara's, then Guerra's, then the last location of the Lincoln, then to the bagel store. They repeated that circuit twice, finally stopping at the bagel store. C. Liberatore waited until a customer left, then entered the store and looked to see if anyone was in the back. Seeing no one, he asked Speranza, the clerk behind the counter, where Ferrara and Guerra were. Speranza asked why C. Liberatore was looking for them, and reached under the counter. Seeing Speranza reach under the counter, C. Liberatore pulled out his gun and shot Speranza several times, then fled the store. The Liberatores drove home, where C. Liberatore showered while A. Liberatore abandoned the car in the Georgetown section of Brooklyn. The gun used in the shooting was broken and disposed of, and A. Liberatore's wife was told to report his car stolen.

The Liberatores went to an off-track gambling location run by Malpeso, where they told Malpeso, Amato and others present what had happened. Patty Amato arrived and, after a private conversation with Malpeso and Amato, ordered Amato to hide C. Liberatore from the police. Amato then directed Chris Barrett, an associate of his, to take C. Liberatore to Barrett's apartment and keep him there until further notice. Barrett did so. According to A. Liberatore's testimony, he, Amato and other confederates then went back to A. Liberatore's car and drove it to an industrial area in Canarsie, where they wiped it down for fingerprints and pulled the ignition out to make it appear as though it had been stolen and abandoned.

II. *The Avenue P Shooting*

Following the Speranza murder, C. Liberatore continued to be assigned to Malpeso, who continued to be part of Patty Amato's crew. According to C. Liberatore's testimony, Patty Amato's crew regularly went out as a hit team to kill members of the Persico faction. When out in this fashion, they would frequently encounter other Orena faction hit teams. One such team was run by Scopo and Salvatore Miciotta, and included Gallagher.

C. Liberatore testified in detail about six separate incidents in which he and Gallagher jointly participated in attempts to murder members of the Persico faction. One of these incidents was the Avenue P shooting, in which a young man was shot and seriously injured. The Avenue P shooting occurred on June 4, 1992. C. Liberatore met Scopo, Miciotta, Malpeso and Gallagher at Café on N. The group accompanied Scopo to a meeting in Coney Island, then proceeded to drive around looking for Persico Loyalists. Malpeso handed C. Liberatore a .38 caliber pistol and stated that if anything happened, he and Gallagher were to be the shooters. They passed a dark blue Lincoln with two males inside. Gallagher identified one of them as Thomas McLaughlin, a Persico loyalist, and began shooting at the car through the window. The men in the Lincoln exited the car and ran. Gallagher and C. Liberatore exited their car and continued firing. C. Liberatore testified that he fired at three people who were in the nearby park running toward him, and Gallagher fired down the block at one of the people from the Lincoln. Daniel Norden, an innocent bystander sitting on a bench in the park, was shot in the head and suffered near-fatal injuries. Eyewitnesses substantially corroborated C. Liberatore's account of the incident.

Scopo called them back to the car and they drove off. Several blocks away, the group split up. Gallagher proposed disposing of the guns they had used. C. Liberatore wiped down his gun and threw it into a storm sewer.

III. *Indictments*

A series of indictments were handed down on December 8, 1993, each charging various members of the Orena faction with, *inter alia*, conspiracy to murder members of the Persico faction as part of the Colombo war. The indictment leading to convictions in this case (the "Malpeso case") originally charged Malpeso, A. Liberatore and C. Liberatore with conspiracy to murder members of the Persico faction, and with the murder of Speranza. C. Liberatore was also charged with participating in the Avenue P shooting. Another of the December 8 indictments charged Amato and various of his followers with conspiracy to murder members of the Persico faction, loansharking and gambling, and also with using or carrying a firearm in connection with the conspiracy to murder (the "Amato case").

A superseding indictment, returned in the Malpeso case on September 28, 1994, added Amato and Gallagher as defendants. Amato moved for a severance from the Malpeso case and to consolidate the charges against him in the Malpeso case with those in the Amato case. The government opposed the motion, and, on December 9, 1994, the district court denied the motion. Amato renewed this motion in March of 1995, arguing that his due process rights would be violated if the government tried him in two cases. The government again opposed the motion, arguing that the charges were made in a fair and efficient manner. The district court determined that the charges against Amato arose from separate occurrences, and thus found nothing unfair about the separate trials.

Around April 7, 1995, C. Liberatore indicated that he was interested in cooperating with the government. He ultimately pled guilty and became a cooperating witness. Around the same time, A. Liberatore also pled guilty pursuant to a cooperation agreement.

A final superseding indictment, returned in the Malpeso case on May 24, 1995, added Malpeso as a defendant in the counts relating to the Avenue P shooting and clarified the § 924(c) charges. The superseding indictment included ten

counts. Count One, the "war conspiracy" count, charged Malpeso and Gallagher with conspiracy to murder members of the Persico faction of the Colombo Family for the purpose of gaining entrance to and maintaining and increasing their positions in the Colombo Family, an enterprise engaged in racketeering activity, in violation of 18 U.S.C. § 1959(a)(5).

Count Two charged Malpeso with knowingly and intentionally murdering Speranza for the purpose of gaining entrance to and maintaining and increasing their positions in the Colombo Family, in violation of 18 U.S.C. § 1959(a)(1). Count Three charged Amato with knowingly and intentionally assisting offenders in order to hinder and prevent their apprehension, trial and punishment, knowing that an offense against the United States--the murder of Speranza in violation of 18 U.S.C. § 1959 (a)(1)-- had been committed, in violation of 18 U.S.C. § 3.

Counts Four through Six charged Malpeso and Gallagher with knowingly and intentionally (1) committing an assault with a dangerous weapon--the shooting of McLaughlin (Count Four); (2) committing an assault with a dangerous weapon-- the shooting of Norden (Count Five); and (3) attempting to murder McLaughlin (Count Six), all for the purpose of gaining entrance to and maintaining and increasing their positions in the Colombo Family, in violation of 18 U.S.C. § 1959(a)(3) and (5).

Counts Seven through Nine charged defendants with using and carrying firearms in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1). Count Seven charged Malpeso and Gallagher with using and carrying guns in the crime of violence charged in Count One. Count Eight charged Malpeso with using and carrying guns in the crime of violence charged in Count Two. Court Nine charged Malpeso and Gallagher with using and carrying guns in the crimes of violence charged in Counts Four through Six.

Count Ten charged Malpeso with being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

IV. *Convictions and Sentences*

Following a jury trial, Malpeso, Gallagher and Amato were convicted on several counts of the superseding indictment. Malpeso was convicted on four § 1959 counts (Counts One and Four through Six), two § 924(c)(1) counts (Counts Seven and Nine), and the felon in possession count (Count Ten), and sentenced principally to a 95-year term of imprisonment. Gallagher was convicted on four § 1959 counts (Counts One and Four through Six) and two § 924(c)(1) counts (Counts Seven and Nine), and sentenced principally to a 39-year term of imprisonment. Amato was convicted in the Malpeso case on Count Three, charging him as an accessory after the fact in the murder of Speranza, which was committed in violation of § 1959(a)(1). He was also convicted on a § 924(c)(1) count charged in the Amato case, and sentenced principally to a 211 - month term of imprisonment.[2]

This appeal followed.

DISCUSSION

1. *Admissibility of Scarpa/DeVecchio Evidence*

Malpeso argues that the district court erred in precluding the defense from presenting evidence regarding confidential law enforcement information allegedly leaked by Federal Bureau of Investigation ("FBI") agent R. Lindley DeVecchio to Scarpa, an Orena faction member and an FBI informant. Malpeso contends that the excluded evidence would have shown that the alleged Colombo war was in. fact a coup instigated by Scarpa and DeVecchio, and that Malpeso had no intent to violate 18 U.S.C. § 1959, because he was merely acting to protect himself and not acting to increase his position within the Colombo Family. Malpeso also argues that the

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[2] The Malpeso case originally was assigned to Judge Nickerson of the United States District Court for the Eastern District of New York, but was transferred to Judge Dearie. The Amato case was tried before Judge Nicker son. However, Amato's convictions in both the Amato case and the Malpeso case were consolidated for sentencing before Judge Dearie.

court's error was not harmless, because other Orena faction members were acquitted when this evidence was introduced in their trials. We disagree.

We review the district court's determination of the admissibility of evidence for abuse of discretion. *See United States v. Rioux*, 97 F.3d 648, 660 (2d Cir. 1996). We will "not overturn a trial judge's evidentiary rulings unless the judge acted arbitrarily or irrationally." *United States v. Blanco*, 861 F.2d 773, 781 (2d Cir. 1988). No abuse of discretion has been demonstrated.

Throughout the Colombo war, DeVecchio was the supervisor of C-10, the FBI squad investigating the Colombo and Bonanno crime families. He also was the sole contact agent for informant Scarpa. DeVecchio's fellow agents eventually became convinced that DeVecchio was providing law enforcement information to Scarpa. These fellow agents, in particular Agent Christopher Favo, waited a considerable time before expressing their concerns to DeVecchio's supervisor, Assistant Special Agent in Charge Donald North. During that time, it became apparent to Favo that Scarpa was aware of a significant amount of law enforcement information that Favo had given DeVecchio.

The government moved *in limine*, pursuant to Fed. R. Crim. P.12(b) and 12(e), for an order precluding defendants from suggesting before the jury or otherwise eliciting testimony relating to the Scarpa/DeVecchio issue. In support of its motion, the government argued that defendants' true aim in seeking to introduce this evidence was to divert the jury's attention from defendants' conduct to the conduct of Scarpa, the FBI, and the U.S. Attorney's office during the Colombo war. The government further argued that the evidence was being sought to discredit the government and obtain an acquittal based upon jury nullification.

The district court determined that evidence of the Scarpa/DeVecchio issue was not relevant under Fed. R. Evid. 401 to the line of defense the defendants wished to pursue, and that any possible relevance was outweighed by the risk of

unfair prejudice under Fed. R. Evid. 403. The district court was unpersuaded that the evidence would show that there was no war but rather "one nut running amok" and everyone else "taking cover." (Malpeso J.A. at 127). The court stated:

> I am struggling mightily to detect a line of relevancy that is sufficiently probative in my view to overcome what I think are legitimate 403 implications. Indeed, I'm having difficulty getting over the initial hurdle of relevance and what I have done aside from reading and rereading the papers is I've taken actually to reading the transcripts of the trials, including the arguments of counsel, particularly the defense in the Orena case and in the Cutolo case
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> . . . .
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> Putting aside, with all due respect, the rhetoric and hyperbole, [the Scarpa/DeVecchio issue] is a matter of very serious concern that needs to be explored in an appropriate forum. Whether this is such a forum really just depends on the question of whether or not it's relevant and, if so, sufficiently relevant to overcome what I consider to be a rather large potential, undeniable potential for prejudice.

(Malpeso J.A. at 167-68).

Fed. R. Evid. 402 provides that only "relevant evidence", is admissible. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. However, Rule 403 provides that even relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading. the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

It seems to us that the district court properly exercised its discretion in determining that the Scarpa/DeVecchio evidence is of little or no relevance to the crimes charged in this case. Malpeso's argument that the evidence would show that Scarpa perceived himself as immune from prosecution and free to commit crimes with impunity does not lead to the conclusion that the Colombo war did not exist. If Scarpa had this power and information, he could have used it to pursue his own interests, or to advance the interests of the Persico faction. Malpeso's argument that his knowledge of Scarpa's emboldened position would make him concerned for his safety and motivated by self-defense is contradicted by the lack of evidence that it was commonly known among Orena loyalists, including Malpeso, that Scarpa had law enforcement source. It is difficult to see how Scarpa's position could have informed their conduct if they were unaware of it.

Furthermore, even if the evidence were of some marginal relevance, that relevance is far outweighed by the risk of prejudice. The likely (and presumably intended) effect of admitting evidence of the Scarpa/DeVecchio issue would have been to shift the focus away from the relevant evidence of the defendants' wrongdoing to the tangentially related misdeeds of one government agent. Such a diversion not only risked needlessly delaying the trial, but also created the very real possibility that the jury would improperly discredit the government's case in reaction to DeVecchio's allegedly gross misconduct. To the extent evidence of the Scarpa/DeVecchio issue may have been relevant, it was not improper for the district court to exclude the evidence under Rule 403.

Finally, the fact that other district courts have reached different conclusions, admitting some or all of this evidence,[3] does not render the district court's decision in this case an

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[3] For instance, Judge Korman admitted the Scarpa/DeVecchio evidence in United States v. Orena, No. 93 CR 1366 (E.D.N.Y. 1994), Judge Nickerson admitted evidence that Scarpa was an informant, but excluded evidence that an FBI agent may have leaked confidential information to him.

abuse of discretion. *See. e.g., United States v. Williams*, 81 F.3d 1434, 1437 (7th Cir. 1996) (that verdicts had been set aside in four related cases based on discovery of perjured testimony has no bearing on whether the district court from which appeal was taken abused its discretion in denying motion for new trial on same grounds). Indeed, for its own evaluation of the minimal relevancy and prejudicial the district court took the trouble to review the transcripts of the other cases and found therein additional support effects of the evidence offered in this case.

II. *Sufficiency of the Evidence Claims*

Amato, argues that there was insufficient evidence to convict him of being an accessory after the fact to a homicide committed in violation of 18 U.S.C. § 1959(a)(1), i.e., the Speranza murder, because there was insufficient evidence that the Speranza murder was committed for the purpose of "maintaining or increasing position in an enterprise engaged in racketeering activity," a requisite of 18 U.S.C. § 1959(a)(1). Specifically, Amato argues that because Speranza was an innocent bagel store clerk, not a target of the Orena faction, and his killing was essentially an accident or the result of an act of self-defense, his death at the hands of C. Liberatore could not possibly have served to promote or maintain C. Liberatore's position in the organization. We disagree.

"An appellant challenging the sufficiency of the evidence bears a very heavy burden." *Amato*, 15 F.3d at 235 (quotation omitted). "[T]he evidence [must] be viewed in the light most favorable to the government and all permissible inferences drawn in its favor." *United States v. Sureff*, 15 F.3d 225, 228 (2d Cir. 1994). "[S]hould the evidence, thus construed, suffice to convince any rational trier of fact beyond a reasonable doubt, then [the] conviction must stand. The government's case need not exclude every possible hypothesis of innocence, and the jury's verdict may be based entirely on circumstantial evidence." *Id.* (citations and internal quotation omitted).

The evidence presented was sufficient to permit a rational juror to infer that C. Liberatore committed the murder in violation of 18 U.S.C. § 1959(a)(1), and that Amato was an accessory after the fact to that offense. In *United States v. Concepcion*, we held that the motive requirement of § 1959 is "satisfied if the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership." 983 F.2d 369, 381 (2d Cir. 1992). We are not persuaded by Amato's argument that C. Liberatore entered the bagel store to kill Guerra and Ferrara in violation of 18 U.S.C. § 1959, but that when he saw that they were not there, murder in furtherance of his position ceased to be his object or intention, and that he simply was buying a soda when he shot Speranza in self-defense. We were unpersuaded hy a similar argument in *Concepcion*, in which we rejected the defendant's contention that § 1959 does not apply to the murder of an "incidental victim" who "got in [the defendant's] way." *Id.* at 381-82.

The evidence presented clearly showed that the purpose and motivation for C. Liberatore's presence in the bagel store was to maintain or increase his position, and the position of the Orena faction, in the Colombo Family. Although Speranza was not an initially intended victim, his murder occurred in the course of a plot to murder in violation of 18 U.S.C. § 1959(a)(1). The facts presented make this clear: C. Liberatore searched the store for his targets and did not find them; he brought a soda up to the counter and asked where his targets were; Speranza asked why C. Liberatore wanted to know and, as he did so, reached below the counter; C. Liberatore drew his weapon and shot Speranza. What particular thoughts were going through C. Liberatore's mind are not for us to know, but surely a reasonable jury could infer that C. Liberatore was still in the course of his murderous conduct when he asked Speranza where his targets were, and that C. Liberatore shot Speranza in part because he feared that Speranza might try to protect his bosses or otherwise impede C. Liberatore's objective.

Amato also argues that our opinion in *United States v. Thai*, 29 F.3d 785 (2d Cir. 1994), dictates a finding of insufficient evidence. This argument is without merit. In *Thai*, we held that there was insufficient evidence of a § 1959 violation where the defendant, the head of a criminal organization, bombed a restaurant for approximately $10,000. *See id.* at 818-19. There was no evidence in that case that the bombing was anything more than a hired criminal act. In the present case, evidence was adduced that the Speranza murder was part of a purposeful attack on a rival faction's members in order to assert the dominance of the murderer's faction, and not merely a profit-motivated mercenary venture. Thus, the evidence sufficiently supported the conclusion that Speranza was murdered in violation of 18 U.S.C. § 1959(a)(1). Sufficient evidence was presented to convict Amato of being an accessory after the fact to a federal offense.

III. *Jury Charge on the Gun Counts*

Gallagher argues that the court failed in several respects to properly charge the jury on the 18 U.S.C. § 924(C)(1) counts. First, Gallagher contends that the jury charge on the definition of "use and carry"did not comport with *Bailey v. United States*, 116 S. Ct. 501 (1995). Second, he argues that the court erred in not giving a limiting instruction with respect to certain weapons seized from co-conspirators' homes and car. Third, he contends that the court erred in instructing the jury on alternative theories of liability under the aiding and abetting statute and *Pinkerton v. United States*, 328 U.S. 640 (1946). We address these arguments seriatim.

A. *Bailey*

Gallagher argues that the "use" instruction was fatally flawed because it did not require sufficient evidence to show an "active employment" of the firearm, as required by *Bailey*, 116 S. Ct. at 506, and therefore conflated the meanings of "use" and "carry". We hold any error to be harmless.

The court charged the jury on the gun charges as follows:

> If you find the defendant guilty of the corresponding violent crime, and when I say "corresponding" the violent crime referred to in the particular count, you must also find that the government has proved the following three elements beyond a reasonable doubt before you can find the defendant guilty of the firearm count you are considering:
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> . . . .
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> First, that on or about the date charged, the defendant knowingly and intentionally used or carried a firearm;
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> . . . .
>
> The first element the government must prove beyond a reasonable doubt is that the defendant knowingly and intentionally used or carried a firearm on or about the date charged in the indictment, as I have already explained those terms to you.
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> . . . .
>
> In order for the government to sustain its burden of proof that the defendant used or carried a firearm, it is not necessary for it to establish that the weapon was fired.

(Tr. at 3276-77).

Because no defendant objected to this instruction at trial, we review the charge for plain error. *See United States v. Barbel*, 62 F.3d 456, 459 (2d cir. 1995). For a conviction to be reversed for plain error, "(l) there must be an error; (2) it must be clear or obvious; and (3) it must affect substantial rights, which in most cases . . . means that the error must have been prejudicial." *Id.* at 461 (internal quotations and alteration omitted). "if an error meets these requirements, a court of appeals has authority to order correction, but is not required to do so. The applicable test is whether the error seriously affect[s] the fairness, integrity, or public reputation of judicial

proceedings." *Id.* (internal quotations and citation omitted; alteration in *Barbel*).

However, because *Bailey* had not yet been decided at the time of trial, we must apply a "modified plain error" standard. *See United States v. Viola*, 35 F.3d 37, 42 (2d Cir. 1994); *see also United States v. Ballistrea*, 101 F.3d 827, 835 (2d Cir. 1996) (applying *Viola*), *cert. denied*, 117 S. Ct. 1327 (1997). In *Viola*, we held:

> When the source of plain error is a supervening decision, the defendant has not been derelict in failing to object at trial, and there is thus no cause to shift the burden of proving prejudice to the defendant. in this special context, as in harmless error under Rule 52(a), the government must show that the error did not affect the defendant's substantial rights.

35 F.3d at 42.

Therefore, we apply plain error review, but the burden is on the government to show that any error did not affect the defendant's substantial rights.

In *Bailey*, the Supreme Court held that "use" under § 924(c)(1) means "active employment". 116 S. Ct. at 506. The Court explained that "[t]he active-employment understanding of 'use' certainly includes brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm. . . . . But the inert presence of a firearm, without more, is not enough to trigger § 924(c)(1)" *Id.* at 508. We have interpreted *Bailey* to require jury instructions on "using" that include "active-employment connotations." *United States v. Pimentel*, 83 F.3d 55, 60 (2d Cir. 1996).

In this case, the court did not charge that "use" meant "active employment" of a gun. Nor did the court effectively differentiate between "use" and "carry", and the terms were arguably conflated. On the other hand, nothing in the charge suggested that "mere possession." or "proximity and accessibility" of a gun were sufficient to establish use, which was the

Supreme Court's concern in *Bailey*. *See Bailey*, 116 *S.* Ct. at 506; *United States v. Melendez*, 90 F.3d 18, 20 (2d Cir. 1996). Furthermore, because the district court gave little explanation of the meaning of "use", the jury presumably gave the term its "'ordinary or natural' meaning," *Bailey*, 116 S. Ct. at 506, which would require active utilization, not "mere possession."

We need not decide whether there was any error in the instruction, because if there were, it was certainly harmless. *See Pimentel*, 83 F.3d at 59 (applying harmless error). Gallagher was convicted on two counts of assault with a deadly weapon and one count of the attempted murder of McLaughlin, in furtherance of his position in the crime family. Given those verdicts on the Avenue P shooting and the proof of Gallagher's involvement as a shooter, the evidence of gun use, which is applicable to both Counts Seven and Nine, is incontrovertible. *See United States v. Masotto*, 73 F.3d 1233, 1242 n.5 (2d Cir.) ("Although the district court did not instruct the jury that 'use' of a firearm requires a finding that the defendant 'actively employed' a firearm, the evidence establishes that crew members actively employed firearms during a violent crime."), *cert. denied*, 117 S. Ct. 54 (1996).

B. *Co-conspirators' Guns*

Gallagher also argues that the jury charge was erroneous because it did not include any limiting instruction that a conviction on Count Seven, which charged gun use in Count One, the war conspiracy, could not be based upon the firearms seized from an automobile driven by Daniel Pitera, the homes of Victor J. Orena and Christopher Barrett, and a garage belonging to Patty Amato. Gallagher contends that the introduction of these guns, in combination with the court's instructions on *Pinkerton* and aiding and abetting theories of liability, may have led to his § 924(c)(1) conviction based purely on his co-conspirators' mere possession of guns. We disagree.

We review *de novo* the district court's jury instructions. *See id.* at 1238. "An erroneous jury instruction requires a new trial unless the error is harmless." *Id.*

Gallagher requested on several occasions a limiting instruction regarding guns seized from Pitera, Orena, Barrett and Patty Amato, the last time being at the charging conference. At that conference, Gallagher requested an instruction that "there is no evidence that Mr. Gallagher had anything to do with" weapons seized at Orena's home. The district court indicated that it was unwilling to make that sort of conclusion as to what the evidence proved. Gallagher appeared to agree that the charge was not necessary, stating: "I think we can take the argument off the traditional charge." (Tr. at 2747). Thus, it does not appear that Gallagher ever contested the *legal* relevance of the firearms to the *Pinkerton* or aiding and abetting theories, but rather contested the *factual* connection of those guns to Gallagher.

In any event, any possibility of prejudice is minimal. The record contains evidence of several instances in which the defendants used or carried firearms in connection with the Colombo war. For instance, the evidence showed that during the Avenue P shooting, Gallagher actively used a gun, and Malpeso gave C. Liberatore a gun with the instruction that he be a shooter. The evidence also showed that Gallagher and Malpeso were involved in the effort to kill Robert Tarantola in or about February of 1992, during which time at least two hit team members were carrying guns. Evidence also showed that Malpeso was carrying a gun during an attempt on Joseph Monteleone's life in 1992. Therefore, we hold that even if the lack of a limiting instruction was error, no prejudice resulted. *See Pimentel*, 83 F.3d at 60 (erroneous instruction does not warrant reversal where no danger that jury could have convicted based on legally insufficient theory).

C. *Other Theories of Liability*

Gallagher also argues that the court erred in instructing the jury on two alternate theories of criminal liability for § 924(c) violations: aiding and abetting and *Pinkerton* liability. This

argument is wholly frivolous. We have reaffirmed the appropriateness of aiding and abetting and *Pinkerton* theories of liability for § 924(c)(1) violations in several post-Bailey cases, *see*, *id.* at 58 (*Pinkerton*); *United States v. Pipola*, 83 F.3d 556, 563 (2d Cir.) (aiding and abetting), *cert. denied*, 117 S. Ct. 183 (1996); *Masotto*, 73 F.3d at 1240 (both), and Gallagher presents no persuasive grounds upon which to distinguish his case from these earlier decisions.

IV. *Sentencing Claims*

A. *Constitutionality of U.S.S.G. § 1B1.2(d), comment. (n.5)*

Malpeso argues that U.S.S.G. § 1B1.2(d), comment. (n.5) is unconstitutional because it authorizes the sentencing court to usurp the role of the jury by determining which objects in a multi-object offense were proved beyond a reasonable doubt.[4] We disagree.

Guideline 1B1.2(d) provides: "A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." Application note 5 explains:

Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense.

Count One charged Malpeso and Gallagher with conspiracy to murder members of the Persico faction in order to gain entrance to and maintain and increase their positions in the

[4] This argument applies equally to Gallagher, who joins in his co-appellant's arguments pursuant to Fed. R. App. P. 28(i), and to whom U.S.S.G. § 1B1.2(d) was also applied.

Colombo Family, in violation of 18 U.S.C. § 1959 (a)(5). Applying note 5 to the unenumerated murders in Count One, the district court concluded, beyond a reasonable doubt, that Malpeso had conspired to commit the McLaughlin/Norden shooting and to kill Speranza and the alleged bagel store owners, Ferrara and Guerra. We review *de novo* a challenge to the constitutionality of a sentencing guideline. *See, e.g., United States v. McKneely*, 69 F.3d 1067, 1078 (10th Cir. 1995).

The constitutionality of § 1B1.2(d), comment. (n.5) has not been addressed by this Court. The Tenth Circuit has expressly found the guideline unconstitutional, *see United States v. Bush*, 70 F.3d 557, 561-62 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 795 (1996), and the Ninth Circuit, in dicta concerning a pre-Guidelines sentence, has cast doubt upon its constitutionality, *see United States v. Garcia*, 37 F.3d 1359, 1371 n.4 (9th Cir. 1994). On the other hand, the Third and Seventh Circuits have held the guideline constitutional. *See United States v. Edwards*, 105 F.3d 1179, 1180 (7th cir. 1997), *petition for cert. filed*, (U.S. Apr. 21, 1997) (No. 96-8732); *United States v. Conley*, 92 F.3d 157, 168 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 1244 (1997).

In *Bush*, the defendant pleaded guilty to one count of conspiracy to possess with intent to distribute and to distribute either cocaine base or cocaine powder. 70 F.3d at 559. The district court, applying § 1B1.2(d), comment. (n.5), sentenced the defendant on the basis of crack cocaine, which carries a higher offense level than cocaine powder. *See id.* at 560. The Tenth Circuit held that where a general verdict or plea is entered on a charge including several objects, the district court must sentence the defendant based on the object with the lowest offense level. *See id.* at 561. Based on this analysis, the *Bush* court held unconstitutional § 131.2(d), reasoning that

> [because the object of a conspiracy is an element of the offense, the Fifth and Sixth Amendments require a jury to determine all facts necessary to establish the existence of the object of the conspiracy, and the government must prove it beyond a

> reasonable doubt. Thus, the procedure authorized in U.S.S.G. § 1B1.2(d), comment. (n. 5) would have violated the Fifth and Sixth Amendments by taking this issue away from the jury and placing it in the hands of the judge. *Id.* at 561-62 (citations omitted).[5]

But see *Edwards*, 105 F. 3d at 1180 (rejecting cases with similar reasoning).

Bush is distinguishable from the case at hand, and we need not address its holding, nor the contrary holding of the Seventh Circuit in *Edwards*. Here, Malpeso was convicted in Count One of the commission of one crime under one statute--conspiracy to murder, in violation of 18 U.S.C. § 1959(a)(5). There is no question which crime he committed nor which statutory maximum sentence is applicable. *See* 18 U.S.C. § 19S9(a)(5) (ten years). Nor is there any question that the objects of the crime are murders.

It is clear to this Court, from the Supreme Court's decision in *Griffin v. United States*, 502 U.S. 46 (1991), that the application of § 1B1.2(d), comment. (n.5) to this case involves valid sentencing considerations and not the violation of any Sixth Amendment guarantee. In *Griffin*, the Supreme Court rejected a due process argument that a general verdict of guilty to a multi-object conspiracy count could not stand if evidence on one of those objects was insufficient. *See id.* at 60. We agree with the Third Circuit in *Conley*, which reasoned that if

> it were constitutionally impermissible to treat the object of a multi-object conspiracy indictment as a sentencing factor rather than as an element of the

---

[5] The Tenth Circuit noted that in a multi-object conspiracy case such as this, the only way to avoid the constitutional problem presented is either to make the language of the indictment specific, or "to instruct the jury to render a special verdict which reveals on its face which of the criminal objectives it found the government proved at trial." *Bush*, 70 F.3d at 562.

> crime, then it is difficult to understand how the *Griffin* Court, consistently with [the requirement that the government prove every element of a crime beyond a reasonable doubt], could have permitted a conspiracy conviction to stand when there was insufficient evidence to support a conviction for one of the objects.

92 F.3d at 166.

The sentencing court's determinations on the objects of a multi-object conspiracy do not constitute criminal verdicts, such that a defendant's Sixth Amendment rights are violated. The jury returned a verdict on only one count of conspiracy to murder. In this case, as in *Griffin*, the proof or lack of proof of any one particular object of the conspiracy, even if arguably a constituent of the broad conspiracy, will have no effect on the verdict as a whole nor on the applicable statutory maximum sentence. Because the conspiracy conviction is satisfied if any one of the objects is proved beyond a reasonable doubt, the multiplicity of objects can only be, and certainly is, relevant to sentencing.

In light of our recognition that it is the function of the sentencing court to determine facts relevant to sentencing, and that this may be done by a preponderance of the evidence, see *Concepcion*, 983 F.2d at 388, the stricter "beyond a reasonable doubt" standard mandated by application note 5 cannot be in error. Thus, we hold constitutional U.S.S.G. § 1B1.2(d), comment. (n.5).

B. *Increase in Offense Level for Norden Injuries*

Gallagher argues further that the sentencing court erred in increasing his offense level four points by transferring the injuries sustained by Norden, a victim in the Avenue P shooting, to the offense level for Counts Four and Six, conspiracy to murder/attempted murder/assault of McLaughlin. In particular, Gallagher contends that increasing his offense level for the injury to Norden was inappropriate because the

conspiracy for which he was sentenced was the conspiracy to murder McLaughlin. We disagree.

The district court increased Gallagher's base offense by tour levels based on the injuries sustained by Norden, pursuant to U.S.S.G. § 2A2.1(b)(1)(A), which instructs the court to increase by four levels "[i]f the victim sustained permanent or life-threatening bodily injury." The court explained:

> If you do the multiple count analysis and computations, as we have done, certain counts fold into themselves, and by that I mean the assault, the McLaughlin, Norden assault, the pseudo-count, the attempted murder of McLaughlin, in my view, requires the Court to calculate the injuries to Daniel Norden as part of that count, in the classical, common law notion of transference. He could have been found guilty of the murder of Daniel Norden, God forbid the boy had died, even though he had no intention of murdering him. It seems to me perfectly logical, indeed compelling, that the injuries that young fellow sustained should he calculated when we do the pseudo-count analysis into the pseudo-count involving the conspiracy to murder McLaughlin.

(App. at 637i-37j). However, the court also offered an alternative formulation of the increase as an upward departure:

> But when we are calculating the attempt to murder Mr. McLaughlin, I don't use McLaughlin's injuries .... I think I am impelled, either as a matter of guidelines calculation, which I think is sound, or even as a matter of departure to calculate, if you will, the nature of the injuries sustained by Mr. Norden and that's where we differ.

(App. at 641).

Although the district court offered alternative grounds for the four-level increase, we see no need to explore the

application of the doctrine of transferred intent to this guideline, as the increase was clearly an appropriate upward departure. U.S.S.G. § 5K2.0, p.s., provides for departures from the Sentencing Guidelines where the sentencing court finds "'an
aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" (Quoting 18 U.S.C. § 3553(b).) Section 5K2.0 allows an upward departure for misconduct that, though not technically covered by the Guidelines' definition of relevant conduct, was still related to the offense of conviction. *See United States v. Tropiano*, 50 F. I57, 164 (2d Cir. 1995). We review the district court's departure for an abuse of discretion. *See Koon v. United States*, 116 S. Ct. 2035, 2046 (1996). In so doing, we generally apply a three-part analysis: first, we determine *de novo* whether this factor is related to the offense and not adequately considered by the Sentencing Commission, see *United States v. Sisti*, 91 F.3d 305, 315 (2d Cir. 1996); second, we determine whether the district court's departure is supported by findings of fact, see *Tropiano*, 50 F.3d at 164; last, we ascertain whether the district court adequately has explained how it determined the extent of its departure, *see id.*

Courts have held that § 2A2.1 and similar guidelines that refer to increases based on injury to "the victim" are predicated upon the risk to a single intended victim, and do not account for injuries and risks of injury to bystanders or multiple victims. *See United States v. Carpenter*, 914 F.2d 1131, 1134 (9th Cir. 1990) (§ 2A2.1); *see also United States v. Pittman*, 55 F.3d 1136, 1139 (6th Cir. 1995) (§§ 2A1.5 and 2E1.4); *United States v. Moore*, 997 F.2d 30, 36-37 (5th Cir. 1993) (§ 2A2.2(b)(3)); *United States v. Johnson*, 931 F.2d 238, 241 (3d Cir. 1991) (same); *United States v. Graves*, 908 F.2d 528, 531 (9th Cir. 1990) (same). For this reason, these courts have held appropriate upward departures based on aggravating circumstances where multiple victims or third-parties were injured in the offense, pursuant to U.S.S.G. § 5K2.0. *See, e.g., Moore*, 997 F.2d at 37; *Carpenter*, 914 F.2d at 1135.

On the other hand, in *United States v. Molina*, --- F.3d---, Nos. 96-1260(L), 96-1308, 1997 WL 175095 (2d Cir. Feb. 12, 1997), *petition for cert. filed*, (U.S. Apr. 25, 1997) (No. 96-8787), we explained that "any victim" in U.S.S.G. § 2B3.1 (b)(3) includes bystanders assaulted in the course of a bank robbery. *Id.* at *3. In *United States v. Muhammad*, 948 F.2d 1449 (6th Cir. 1991), cited approvingly in *Molina*, the Sixth Circuit held that in a bank robbery, the actual victim of the crime is the bank itself, and "it would make no sense to provide for an increase . . . for 'bodily injury' to the institution of the bank itself." *Id.* at 1456. Therefore, the Sixth Circuit reasoned that, while in crimes like assault, the victim might best be understood as the one direct victim of the offense, in the context of bank robbery, a broader definition was necessary, one that included those "affected by the commission of the crime." *Id.* at 1456 n.1.

While this distinction in the meaning of "victim" in differing guidelines is somewhat troubling, the distinction is narrowly drawn and justifiable in light of the types of offenses they describe. Therefore, we think that "the victim" - in § 2A2.1(b)(1) refers to the single intended victim of the attempted murder, and thus does not encompass Norden.

Given U.S.S.G. § 2A2.1's failure to provide for injuries to a bystander, we find that such injury is a proper ground for upward departure. U.S.S.G. § 2A2.1, comment. (n.3) expressly provides for upward departures based upon "a substantial *risk* of death or serious bodily injury to more than one person."(Emphasis added.) It is clear to us that if departure based on a risk to a bystander is appropriate, then departure based upon actual injury to innocent third parties is equally appropriate under § 5K2.0. Therefore, the district court properly considered the life-threatening injury to Norden in departing upward from Gallagher's adjusted offense level.

Moreover, the district court made ample findings to support its departure. It is clear that the Norden injuries were closely related to the attempted murder offense, because Norden's injuries were both contemporaneous to and directly caused by

the attempt on McLaughlin's life. Furthermore, the district court's calculation to the magnitude of departure was well reasoned, as it was drawn in direct parallel to the provisions of § 2A2.1 accounting for injury to the victim of the attempt. *See e.g., United States v. Kikumura*, 918 F.2d 1084, 1112 (3d Cir. 1990) (analogy to existing guideline provision is appropriate in determining extent of departure). Therefore, we find no error in the district court's application of a four-level upward departure.

C. *Consecutive Terms for Using or Carrying Gun*

Gallagher's final argument is that the district court erred by allowing him to be convicted on two § 924(c)(1) counts (Counts Seven and Nine) based on a single criminal impulse and action. In particular, Gallagher argues his second § 924(c) violation (Count Nine) was based on his participation in the Avenue P shooting (Counts Four through Six), and the first § 924(c) violation (Count Seven) was based on his participation in the conspiracy to murder members of the Persico faction (Count one), when in fact the jury may well have relied on the Avenue P shooting in finding him guilty of the war conspiracy. Therefore, Gallagher argues that he may have received two § 924(c)(1) convictions based on one criminal event, the Avenue P shooting, and that this is unlawful. We reject his argument because we disagree with his premise.

The evidence overwhelmingly established that Gallagher carried guns on several occasions throughout the conspiracy charged in Count One. There is no realistic possibility that the jury convicted on both 924(c) counts by focusing only on his carrying a gun during the Avenue P episode. Moreover, if Gallagher thought that the evidence of his carrying a gun on days other than the day of the Avenue P episode was too insubstantial to support a jury verdict an the gun count related to the overall conspiracy, he was obliged to seek appropriate relief before the case went to the jury. *See United States v. Washington*, 861 F.2d 350, 352-53 (2d Cir. 1988).

For these reasons we need not consider whether two offenses, committed at one time but sufficiently distinct in

elements to permit separate sentences, may serve as the predicates for two consecutive 924(c) sentences based on a single act of carrying or using a gun. *Compare United States v. Floyd*, 81 F.3d 1517, 1527 (l0th Cir.) (use of a gun in a kidnapping/carjacking supported violations of § 924(c)(1) for both substantive crimes because "[s]eparate crimes do not become a single offense merely because they arise out of the same criminal episode or because the same gun is paired with each underlying offense" (internal quotations omitted)), *cert. denied*, 117 S. Ct. 144 (1996), *with United States v. Johnson*, 25 F.3d 1335, 1338 (6th Cir. 1994) ("possession of one or more firearms in conjunction with predicate offenses involving simultaneous possession of different controlled substances should constitute only one offense under § 924(c)"). Thus, we hold that the district court did not err in convicting Gallagher of two § 924(c)(1) offenses.

We have carefully considered the defendants' remaining contentions and find them all to be without merit.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

Appendix B

Opinion of the United States Court of Appeals for the Second Circuit Denying Petitioner's Motion for Rehearing

(October 3, 1997)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 3rd day of October, one thousand nine hundred and ninety-seven.

USA

Appellee,

v.

Malpeso

Defendant-Appellant.

FILED
OCTOBER 3, 1997

GEORGE LANGE III
CLERK

Dkt No. 96-1252

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Louis Malpeso.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active

service and to any other judge that heard the appeal and that no such judge has requested that vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: s/s Beth J. Meador
Administrative Attorney

Appendix C

Application for Extension of Time to File Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

(December 17, 1997)

No.:_____

In The

Supreme Court Of The United States

October Term, 1997

LOUIS MALPESO,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Second Circuit:

Petitioner Louis Malpeso prays for a 30 day extension of time to file his petition for certiorari in this Court to and including February 2, 1998. The final judgment of the Second Circuit was entered on June 3, 1997 (Exhibit A hereto);

Malpeso's rehearing petition was denied on October 3, 1997 (Exhibit B hereto); and his time to petition for certiorari in this Court expires January 2, 1998. This application is being filed more than 10 days before that date. Counsel seeks this extension due to an overwhelming press of other professional commitments, including the following:

A. Since December 4, 1997, Counsel has been actively engaged in the trial of *Trans World Airlines, Inc. v. Carl Icahn, et al.*, No. 96CC-000121 (Mo. Cir. Ct., St. Louis Cty.). The *Icahn* trial will continue through December 19, and is scheduled to resume in 1998.

B. Beginning on December 22, 1997, the Monday after Counsel's return to New York, he is scheduled to try the case of *Francois Botha v. Don King Productions, Inc.*, No. 97 CIV 7587 (S.D.N.Y.) (JGK). The *Botha* trial is expected to last approximately one week.

C. On December 29, 1997, Counsel is scheduled to file an extensive reply brief in the murder case of *United States v. Rita Glazman*, No. 97-1281 (2d Cir.), a weighty and complex appeal in which (I) the defendant, Counsel's client, has been sentenced to life imprisonment, and (ii) the opening and answering briefs numbered over 90 pages apiece.

D. On January 5, 1998, Counsel is due to file a post-hearing reply brief in the case of *United States v. Harvey Glick*, No. 97-CV-3905 (E.D.N.Y.) (SJ), a 28 U.S.C. § 2255 proceeding involving an ineffective assistance of counsel claim.

E. Beginning on January 7, 1998, Counsel is scheduled to resume an ongoing arbitration in the case of *Rommy Hunt Revson v. The New L&N Sales and Marketing, Inc.* Since counsel has just been retained to take over the arbitration, the case will require intensive emergency preparation.

F. On January 12, 1998, Counsel is scheduled to file a major appeal brief in the case of *United States v. Luchese Organized Crime Family, et al.*, No.97-6274 (2d Cir.), a massive

and long-running civil RICO action involving allegations of corruption in the New York sanitation industry.

G. Also on January 12, Counsel is obligated to file a motion for leave to appeal to the New York Court of Appeals in the case of *Donald Orseck et al. v. Lorit Shemesh.* This application will require the preparation of a full brief on the merits, in the nature of a *certiorari* petition.

H. In early 1998, Counsel is committed to handling complex and hotly contested sentencing proceedings in the cases of *United States v. Chandradutt and Sewdutt Harpaul,* No. 97 CR 0303 (E.D.N.Y.) (ADS); *United States v. Burton Kaplan,* No. 96 CR 851 (E.D.N.Y.) (CBA); and *United States v. Donald Herzog,* No. 93 CR 777 (S.D.N.Y.) (CLB).

I. To further complicate this difficult situation, Counsel is in the process of relocating his office, a process which continues to disrupt his regular work flow.

Given these trying circumstances, Counsel cannot complete Malpeso's *certiorari* petition – at least not competently – by the current January 2 deadline. Granting a 30 day extension will not prejudice the government because Malpeso is presently serving a 95 year sentence.

WHEREFORE, petitioner respectfully requests an order extending his time to petition for certiorari to and including February 2, 1998.

Respectfully submitted,

JUDD BURSTEIN, ESQ. (JB9585)
BURSTEIN & FASS LLP
99 Park Avenue
New York, New York 10016
(212) 681-0606

December 17, 1997

Appendix D

Order Granting Extension of Time

December 22, 1997

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court

Area Code 202
479-3011

NOTIFICATION LIST

Mr. Judd Burstein
99 Park Avenue
New York, NY 10016

Hon. Seth P. Waxman
Solicitor General
Department of Justice
Washington, DC 20530

Clerk
United States Court of Appeals for
the Second Circuit
1702 US Courthouse, Foley Sq.
New York, NY 10007

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court

Area Code 202
479-3011

December 22, 1997

Mr. Judd Burstein
99 Park Avenue
New York, NY 10016

Re: Louis Malpseo
v. United States
Application No. A-463

Dear Mr. Burstein:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on December 22, 1997, extended the time to and including January 31, 1998.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By s/s Loretta S. Ruffin

Loretta S. Ruffin
Assistant Clerk

Appendix E

Application for Extension of Time to File Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

(January 20, 1998)

No.:_____

In The

Supreme Court Of The United States
October Term, 1997

LOUIS MALPESO,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Second Circuit:

Petitioner Louis Malpeso prays for an additional 30 day extension of time to file his petition for certiorari in this Court to and including March 2, 1998. The final judgment of the Second Circuit was entered on June 3, 1997 (Exhibit A hereto); Malpeso's rehearing petition was denied on October

3, 1997 (Exhibit B hereto); and his certiorari petition was originally due January 2, 1998. Previously Your Honor extended that deadline until January 31, 1998. (Exhibit C hereto) This application is made at least 10 days before that date.

Counsel seeks this extension for the following reasons:

First, I have been on trial in St. Louis, Missouri, in connection with the case of *Trans World Airlines v. Carl Icahn,* almost continuously since December 4, 1997, having just returned to my New York office last week. Accordingly, I have not yet been able to focus in earnest on Mr. Malpeso's certiorari petition, and will need additional time (a) to write the petition, and (b) to consult with my client – who is incarcerated in Leavenworth, Kansas – regarding its preparation.

Second, I have just relocated my office, and am in the process of trying to get my practice up and running again – a nightmarish experience that is wreaking havoc with my business and disrupting my regular work flow.

Third, the attorney assisting me on this appeal – my former associate, Marc Fernich – has just left to open a solo practice, and is in the process of trying to get his **own** office up and running. I am counting heavily on Mr. Fernich's help in completing Mr. Malpeso's certiorari petition. Yet, the demands of starting his new business are occupying much of his working time.

Fourth, a medical emergency has struck Mr. Fernich's immediate family. His only sister, 29, has just had major surgery to remove cancerous growths that suddenly reappeared in her chest and lungs. Complications have arisen and she remains hospitalized. When she is finally released, she will undergo intensive radiation treatment. Understandably, Mr. Fernich is spending significant time with his family during this difficult period – time that is further reducing his available working hours.

Given this confluence of circumstances, we cannot complete Mr. Malpeso's certiorari petition – at least not

competently – by the current January 31 deadline. Granting the short extension that we seek will not prejudice the government because Mr. Malpeso is serving his 95 year sentence.

WHEREFORE, petitioner respectfully requests an order extending his time to petition for certiorari to and including March 2, 1998.

Respectfully submitted,

JUDD BURSTEIN, ESQ. (JB9585)
BURSTEIN & FASS LLP
1790 Broadway
New York, New York 10019
(212) 974-2400

January 20, 1998

CERTIFICATE OF SERVICE

I, Judd Burstein, a member of the Bar of this Court, hereby certify that on January 20, 1998, a copy of the Motion for an Extension of Time to File the *Certiorari* Petition in this case was sent by Federal Express to each of the following government counsel:

Valerie Caproni, Esq.
Sung -Hee Suh, Esq.
Assistant United States Attorneys
Eastern District of New York
One Pierrepont Plaza
Brooklyn, New York 11201

Solicitor General of the United States
Room 5614
Department of Justice
10th Street and Constitution Avenue, N.W.
Washington, D.C. 20530

I further certify that all parties required to be served have been served.

JUDD BURSTEIN, ESQ. (JB9585)
1790 Broadway
New York, New York 10019
(212) 974-2400

Counsel for Petitioner

Appendix F

Order Denying Extension of Time

(January 22, 1998)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court

Area Code 202
479-3011

January 22, 1998

Mr. Judd Burstein
99 Park Avenue
New York, NY 10016

Re: Louis Malpseo
v. United States
Application No. A-463

Dear Mr. Burstein:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on January 22, 1998, denied the application.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By

Loretta S. Ruffin
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court

Area Code 202
479-3011

February 10, 1998

To: Judd Burstein
1790 Broadway
New York, NY 10019

212 974-2400

FAX 212 974-2944

RE: Louis Malpseo v. U.S.
Extension of time. A-463

FROM: Loretta Muffin Clerk's Office
202 479-3039

PAGES: 2

SUPREME COURT OF THE UNITED STATES
1 FIRST STREET, NE
WASHINGTON, D.C. 20543

SEAL OF THE
SUPREME COURT
OF THE
UNITED STATES

To: Judd Burstein

Fax Number: 212 974-2944

From: Loretta Ruffin

Description: Service A-463

Number of pages (including cover): 2

Date sent: 2-11-98

Time sent: 10:15 A.M.

If there are any problems receiving this transmission, please call:

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WILLIAM K. SUTER
Clerk of the Court

Area Code 202
479-3011

NOTIFICATION LIST

Mr. Judd Burstein
99 Park Avenue
New York, NY 10016

Hon. Seth P. Waxman
Solicitor General
Department of Justice
Washington, D.C. 20530

Appendix G

Constitutional and Statutory Provisions Involved in this Appeal

Fed.R.Evid 401
Fed. R. Evid. 403
18 U.S.C. § 922(g)(1)
18 U.S.C.§924
18 U.S.C. § 1959
U.S. Const. Amend. I Art. [V]
U.S. Const. Amend. I, Art. [VI]
U.S.S.G. § lBl.2(d) and Application Note 5

RULE 401. "Definition of Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

RULE 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

18 U.S.C. § 922

(g) It shall be unlawful for any person—

> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year. . .to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924

(a) (2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(c)(l) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machine gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machine gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

18 U.S.C. § 1959. Violent crimes in aid of racketeering activity

(a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with

a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State of the United States, or attempts or conspires so to do, shall be punished—

(1) for murder, by death or life imprisonment, or a fine under this title, or both; and for kidnapping, by imprisonment for any term or years of for life, or a fine under this title, or both;

(2) for maiming, by imprisonment for not more than thirty years or a fine under this title, or both;

(3) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than twenty years or a fine under this title, or both;

(4) for threatening to commit a crime of violence, by imprisonment for not more than five years or a fine under this title, or both;

(5) for attempting or conspiring to commit murder or kidnapping, by imprisonment for not more than ten years or a fine under this title, or both; and

(6) for attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury, by imprisonment for not more than three years or a fine under this title, or both.

(b) As used in this section—

(1) "racketeering activity" has the meaning set forth in section 1961 of this title; and

(2) "enterprise" includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce.

U.S. Const. Amend. I, Art [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. I, Art [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S.S.G. § lBl.2

> (d) A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

Application Note

5. Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense. Note, however, if the object offenses specified in the conspiracy

count would be grouped together under §3D1.2(d) (*e.g.*, a conspiracy to steal three government checks) it is not necessary to engage in the foregoing analysis, because §1B1.3(a)(2) governs consideration of the defendant's conduct.

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No. 97-1404

In the Supreme Court of the United States

OCTOBER TERM, 1997

LOUIS MALPESO, AKA BOBO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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16 pp

QUESTION PRESENTED

1. Whether petitioner's right to present a defense was improperly impaired when the district court excluded evidence that it found to be of marginal relevance but potentially highly prejudicial.

2. Whether the district court properly applied the Sentencing Guidelines in sentencing petitioner for conspiracy to murder.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is reported at 115 F.3d 155.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1997. A petition for rehearing was denied on October 3, 1997. Pet. App. A30-A31. On December 22, 1997, Justice Ginsburg extended the time within which to file a petition to and including January 31, 1998. The petition was not filed until February 24, 1998, and is therefore out of time. See Pet. 2-3. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of one count of conspiracy to commit murder, two counts of assault with a dangerous weapon, and one count of attempted murder, in each case for the purpose of gaining entrance to or maintaining or increasing his position in an enterprise engaged in racketeering activity, and in each case in violation of 18 U.S.C. 1959(a); two counts of using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c); and one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g). He was sentenced to 95 years' imprisonment, to be followed by three years of supervised release, and was ordered to make restitution in the amount of $24,962.35 and to pay a special assessment of $350. The court of appeals affirmed. Pet. App. A1-A29.

1. From mid-1991 to the end of 1994, two rival factions of the Colombo organized crime family fought a "war" for control of the family in New York. Petitioner and his co-defendants Robert Gallagher and Joseph Amato were members of the faction loyal to Victor Orena. The opposing faction was loyal to Carmine Persico, the imprisoned family boss. Pet. App. A3-A4.

In late 1991, petitioner and Pasquale Amato, a "captain" in the Colombo family, devised a plan to murder Persico loyalists Frank Guerra and Anthony Ferrara. Early in the day on December 8, petitioner, Joseph Amato, accomplices Christopher and Anthony Liberatore, and another man drove in three cars to locate and kill Guerra and Ferrara. Petitioner drove

a so-called "safe" car that did not carry any weapons. The "hit team" drove to Ferrara's house, to Guerra's house, to a bagel shop they believed Ferrara and Guerra owned, and finally back to each house. Finding neither intended victim, the team eventually disbanded. Pet. App. A5.

Shortly after returning to his apartment, petitioner learned that his two sons had been shot. Christopher Liberatore testified that petitioner then ordered him to find and shoot Ferrara and Guerra. The two Liberatores twice made the circuit to Ferrara's house, Guerra's house, and the bagel store, finally stopping at the store. Christopher Liberatore went into the store and asked the counter clerk, 17-year-old Matteo Speranza, where Ferrara and Guerra were. Speranza asked why Liberatore was looking for them, and reached under the counter. Liberatore then shot Speranza several times. The Liberatores drove home, abandoned the car, and disposed of the gun used in the shooting. Pet. App. A3, A5-A6.

The Liberatores reported what had happened to petitioner and Joseph Amato, among others. After a private conversation with petitioner and Joseph Amato, Pasquale Amato directed Joseph to hide Christopher Liberatore from the police. Joseph had an associate hide Christopher, and he and Anthony Liberatore then returned to the abandoned car, drove it to an industrial area, wiped it down to remove fingerprints, and removed the ignition to make it appear that the car had been stolen and abandoned. Pet. App. A6.

After the Speranza murder, Christopher Liberatore remained assigned to petitioner, who remained a member of Pasquale Amato's team. Liberatore testified that the team regularly tried to kill members of

the Persico faction. One such incident took place on June 4, 1992. Petitioner, co-defendant Gallagher, Christopher Liberatore, and others drove around looking for Persico loyalists. Petitioner handed Liberatore a gun and stated that if anything happened, Liberatore and Gallagher were to be the "shooters." The group eventually passed a car containing two men, one of whom Gallagher identified as a Persico loyalist. Gallagher began to fire at the car. When the two men ran from their car, Liberatore and Gallagher also got out and continued firing. Daniel Norden, who was sitting on a bench in a nearby park, was hit in the head and nearly died. Pet. App. A7.

2. A grand jury indicted petitioner on conspiracy and other charges. Pet. App. A8-A9. Before trial, the district court ruled that the defendants would not be allowed to introduce evidence that FBI Agent Lindley DeVecchio had leaked information to Gregory Scarpa, Sr., a Persico loyalist and FBI informant. DeVecchio supervised an FBI squad investigating the Colombo and Bonnano crime families. He was also Scarpa's sole contact agent. DeVecchio's fellow agents, including Christopher Favo, eventually became convinced that DeVecchio was leaking information to Scarpa, but they did not immediately reveal this belief to DeVecchio's supervisor. When they did, the allegations led to an internal FBI investigation and a criminal referral to the Public Integrity Section of the Department of Justice. *Id.* at A10-A11; Gov't C.A. Br. 74.

The government asked the district court for an order precluding defense counsel from eliciting testimony concerning the Scarpa/DeVecchio matter or otherwise referring to it before the jury, arguing that the defense sought to introduce that evidence in order

to divert the jury's attention from the defendants' own conduct, to discredit the government, and to seek an acquittal through jury nullification. After reviewing the transcripts of related trials in which the Scarpa/DeVecchio evidence had been admitted, the trial court determined that the evidence was not relevant under Federal Rule of Evidence 401, and that any possible relevance was outweighed by the risk of unfair prejudice under Rule 403. Pet. App. A11-A12.

The jury found petitioner guilty of conspiracy to commit murder, two counts of assault with a dangerous weapon, and one count of attempted murder, in each case for the purpose of gaining entrance to or maintaining or increasing his position in an enterprise engaged in racketeering activity; two counts of using and carrying a firearm in relation to a crime of violence; and one count of being a felon in possession of a firearm. He was acquitted of one count of committing murder for the same purposes and one count of using and carrying a firearm in connection with that offense. Pet. App. A2, A9.[1]

3. The court of appeals affirmed petitioner's convictions and sentence. Pet. App. A1-A29.

The court rejected petitioner's argument that he should have been permitted to introduce the Scarpa/DeVecchio evidence as a basis for arguing that the alleged Colombo "war" was instead "a coup instituted by Scarpa and DeVecchio," and that he did not have the intent necessary to violate 18 U.S.C. 1959 because he acted, not to preserve or increase his position in the Colombo family, but "merely * * * to protect himself." Pet. App. A10-A11. The court agreed with

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[1] Co-defendants Gallagher and Joseph Amato were also convicted of various crimes. Pet. App. A3.

the trial judge that the Scarpa-DeVecchio evidence was "of little or no relevance to the crimes charged in this case." *Id.* at A13. The court noted that evidence of a special relationship between Scarpa and the FBI would "not lead to the conclusion that the Colombo war did not exist," and that petitioner's "self-defense" argument was "contradicted by the lack of evidence that [Scarpa's relationship to the FBI] was commonly known among Orena loyalists." *Ibid.* Moreover, the court observed that admission of evidence concerning the "the tangentially related misdeeds of one government agent" would have "risked needlessly delaying the trial" and "created the very real possibility that the jury would improperly discredit the government's case in reaction to DeVecchio's allegedly gross misconduct." *Ibid.* Thus, the court concluded, "even if the evidence were of some marginal relevance, that relevance [was] far outweighed by the risk of prejudice" for purposes of Federal Rule of Evidence 403, and the district court therefore did not abuse its discretion in excluding the evidence at trial. *Id.* at A11, A13.

The court of appeals also rejected petitioner's claim that his sentence was constitutionally defective because the district court applied the Sentencing Guidelines in accordance with Application Note 5 to Guidelines § 1B1.2(d). Pet. App. A21-A24. That Note provides that if a jury returns a general verdict of guilty on a count charging a multi-object conspiracy, the court should take into account for purposes of sentencing those object offenses that it would have convicted the defendant of conspiring to commit if it

had been sitting as the trier of fact.[2] The court observed that petitioner's conspiracy conviction involved "one crime under one statute—conspiracy to murder, in violation of 18 U.S.C. § 1959(a)(5)." *Id.* at A23. Because there was "no question" that the object of the conspiracy was one or more murders (*ibid.*), the court reasoned, "the proof or lack of proof of any one particular object of the conspiracy [*i.e.*, any particular murder] * * * will have no effect on the verdict as a whole nor on the applicable statutory maximum sentence" (*id.* at A24). Thus, so long as there was sufficient evidence concerning one of the object murders to support the jury's verdict, further determinations concerning which murders were attributable to petitioner were relevant only to sentencing. *Ibid.* Because a sentencing judge would normally make such findings by a preponderance of the evidence, the court concluded, requiring the judge to

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[2] Section 1B1.2(d) provides:

> A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

Application Note 5 explains that "[p]articular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense."

make them under the stricter standard imposed by the Guidelines could not be in error. *Ibid.*[3]

ARGUMENT

1. Petitioner argues principally (Pet. 10-24) that the trial court improperly excluded evidence of the Scarpa/DeVecchio matter, thereby depriving him of the opportunity to present a defense. The court of appeals properly rejected that contention. As that court concluded (Pet. App. A13), the trial court acted well within its discretion in determining that the proffered evidence was "of little or no relevance to the crimes charged in this case." Petitioner contends (see Pet. 17) that the critical issue in the case against him was whether he acted "for the purpose of * * * maintaining or increasing [his] position in" a criminal enterprise (18 U.S.C. 1959(a)). It is difficult to see how evidence that a senior member of the same enterprise was particularly fearsome or dangerous, or that an FBI agent was improperly providing him with confidential information about his rivals in the organization, would have "any tendency to make the existence of [that intent] * * * less probable." Fed. R. Evid. 401. Moreover, as the court of appeals recognized (Pet. App. A13),

> [t]he likely (and presumably intended) effect of admitting evidence of the Scarpa/DeVecchio issue would have been to shift the focus away from the relevant evidence of the defendants' wrongdoing to the tangentially related misdeeds of one government agent. Such a diversion not only

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[3] The court of appeals also addressed and rejected several arguments raised by petitioner's co-defendants. Pet. App. A14-A21, A24-A29.

> risked needlessly delaying the trial, but also created the very real possibility that the jury would improperly discredit the government's case in reaction to DeVecchio's allegedly gross misconduct.

The trial court therefore did not abuse its discretion in concluding that any relevance the Scarpa/DeVecchio evidence might have had was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" (Fed. R. Evid. 403).

There is no merit to petitioner's argument (Pet. 22) that possible prejudice to the government is never relevant under Rule 403 in a criminal case. Petitioner cites the prior decision of the court below in *United States* v. *Aboumoussallem*, 726 F.2d 906, 911-912 (2d Cir. 1984), which observed that "risks of prejudice are normally absent when the defendant offers similar acts evidence of a third party to prove some fact pertinent to the defense." Neither that case, however, nor *Government of the Virgin Islands* v. *Carino*, 631 F.2d 226, 229-230 (3d Cir. 1980), involved evidence of alleged misconduct by government agents. Compare *United States* v. *Phibbs*, 999 F.2d 1053, 1070 (6th Cir. 1993) (disciplinary investigation of FBI agent), cert. denied, 510 U.S. 1119 (1994); *United States* v. *Peltier*, 585 F.2d 314, 333 (8th Cir. 1978) (evidence that FBI threatened witnesses), cert. denied, 440 U.S. 945 (1979). *Carino*, moreover, relied in its discussion of prejudice (see 631 F.2d at 230) on cases applying Rule 609(a), which explicitly requires the court to balance probative value only against "prejudicial effect *to the accused*" (emphasis added). Cf. *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504

(1989) (discussing Rule 609(a)'s balancing requirement). Rule 403 contains no such textual limitation.

In any event, the risk of "confusion of the issues, or misleading the jury" (Fed. R. Evid. 403) supplied ample justification for the district court's decision to exclude the Scarpa/DeVecchio evidence, even independent of considerations of prejudice. There can be no dispute over the validity of those factors as a basis for exclusion. *Aboumoussallem*, for example, upheld exclusion of the evidence at issue in that case on the ground that the district court had also relied on the possibility of "jury confusion," and the court of appeals was "reluctant to substitute [its] judgment for that of the trial judge." 726 F.2d at 912; see also *Carino*, 631 F.2d at 229-230, citing *United States* v. *Bocra*, 623 F.2d 281, 286 (3d Cir.) (upholding exclusion of proffered defense evidence under Rule 403 because of risk of jury confusion), cert. denied, 449 U.S. 875 (1980); *United States* v. *Stevens*, 935 F.2d 1380, 1406 (3d Cir. 1991) (considering whether defendant's Rule 404(b) evidence "would have distracted the jurors' attention from the real issues in this case" but concluding, on the particular facts involved, that it would not).

Trial courts are properly accorded "wide discretion" in making determinations on the admissibility of evidence (*United States* v. *Abel*, 469 U.S. 45, 54 (1984)), which are generally not to be reversed unless they are "manifestly erroneous" (*General Elec. Co.* v. *Joiner*, 118 S. Ct. 512, 517 (1997)). In this case, the district court carefully considered the proffered evidence and the issues for trial—even reviewing, as the court of appeals noted, the transcripts of other trials in which the evidence had been admitted. Pet. App. A12, A14. The court's fact-bound decision to ex-

clude the evidence was a routine application of basic evidentiary principles, and cannot plausibly be characterized as so "arbitrary or disproportionate" as to raise any question of impingement on petitioner's constitutional right to present a defense. See *United States* v. *Scheffer*, 118 S. Ct. 1261, 1264 (1998).

2. Petitioner also argues (Pet. 24-26) that his sentence was improper because the district court, in applying the Sentencing Guidelines to petitioner's conviction for conspiracy to murder under 18 U.S.C. 1959(a), made its own determination, based on the trial evidence, of which murders petitioner had conspired to commit. That argument is without merit. As the court of appeals pointed out (Pet. App. A23), petitioner's conspiracy conviction was a conviction of "one crime under one statute." Petitioner does not challenge the sufficiency of the evidence to support that conviction. Pet. 5. Nor does he question the court of appeals' observation (Pet. App. A24) that the district court's determination of which particular murders he conspired to commit had "no effect * * * on the applicable statutory maximum sentence" for his offense. See 18 U.S.C. 1959(a)(5) (setting 10-year maximum sentence for "conspiring to commit murder" in violation of Section 1959(a)). Petitioner's challenge to his sentence is therefore based solely on the argument that a district court may not take account of particular conduct, in determining the Guidelines sentencing range for an offense, if the jury, when finding the defendant guilty, might have relied only on conduct that would yield a lower Guidelines range. See Pet. 25. As petitioner effectively concedes (Pet. 26), that claim is foreclosed by this Court's recent decision in *Edwards* v. *United States*, No. 96-8732 (April 28, 1998).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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